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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING PARTS OF

JANUARY AND JUNE TERMS, 1849.

N. W. COCKE, REPORTER.

VOLUME XVI.

MONTGOMERY, ALA.
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OFFICERS OF THE SUPREME COURT

DURING THE TIME OF THESE DECISIONS.

HENRY W. COLLIER, L. L. D., Chief Justice,
EDWARD S. DARGAN, } Associate Justices:
WILLIAM P. CHILTON, }

Until the 1st of July 1849,—and after that date,

EDWARD S. DARGAN, Chief Justice,
WILLIAM P. CHILTON, } Associate Justices.
SILAS PARSONS, }

M. A. BALDWIN, Attorney General.
GEORGE C. BALL, Clerk.

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NOTE BY THE REPORTER.

The Reporter, in presenting his first volume to the Profession, whilst he believes that it will compare favorably with any of its predecessors, regrets that it contains many typographical errors. In its publication, both he and his publishers have labored under many disadvantages, which they will not be subjected to for the future. The succeeding volumes will be printed on a power press, and the Reporter confidently hopes, by the closer personal supervision which his contemplated removal to Montgomery will enable him to bestow on the proof-sheets, aided by the past experience of his publishers, and their increasing familiarity with the hand-writing of the Judges, to place the Alabama Reports, in point of typographical execution, on a level with the best publications of the country.

REPORTS

OF

CASES ARGUED AND DETERMINED

AT THE

JANUARY TERM, 1849.

PERKINS *vs.* MOORE, JUDGE, USE, &c.

1. A legatee or distributee of an estate, after a decree in the Orphans' Court, on final settlement, for the sum ascertained to be due him, may maintain an action on the administration bond against the executor or administrator and his sureties.
2. A declaration on an administration bond, after final decree in the Orphans' Court against the executor, which avers the bequest, the rendition of the final decree in favor of the plaintiff, and the refusal of the executor to pay, is sufficient.
3. A plea of former recovery, which discloses the fact that the former judgment was not a judgment on the merits, is bad on demurrer.
4. The Judge of a County Court cannot sue, in his own name *alone*, on the bond of an executor or administrator. The suit must be in his name for *the use* of the person aggrieved.
5. Where a testator makes a pecuniary bequest, with the direction, that it "be kept and loaned out upon interest by my executors," until the happening of a certain event, then to be divided between the legatees, the executors will be considered as holding the fund *as executors*, and not *as trustees*.
6. An executor will be presumed to hold a legacy as executor, unless it clearly appears from the will, that the testator intended that he should hold in a different capacity.
7. If an executor, invested by the will with power over a legacy, *as trustee*, and not *as executor*, comes into possession of it in his representa-

tive capacity, his election afterwards to hold it *as trustee* must be manifested by some plain and unequivocal act, indicating such intention.

8. The decree of an Orphans' Court against an executor or administrator on final settlement, in the absence of fraud, is conclusive both as to him and his securities.

Error to the Circuit Court of Tuskaloosa County. Tried before Hon. John D. Phelan.

Debt by the defendant against the plaintiff in error. The declaration alleges, that the plaintiff in error, with Edward B. Elliott, Thompson Windham, Enoch Elliott and William Y. Glover, executed their writing obligatory as follows: "Know all men by these presents that we, Edward B. Elliott and Thompson Windham, as executors of John Spencer, Hardin Perkins and Enoch Elliott, as securities for Edward B. Elliott, and John Cummins and William Y. Glover, as securities for Thompson Windham, are held and firmly bound unto Hume R. Field, Judge of the County Court of Tuskaloosa County, and his successors in office, in the penal sum of thirty thousand dollars; to the payment of which they bind themselves, their heirs, executors and administrators; sealed and dated the 24th day of January, 1827. Now the condition of the above bond is such, that whereas the above bounden Edward B. Elliott and Thompson Windham, have been duly appointed executors of the last will and testament of John Spencer, deceased: Now, if they shall well and truly perform all the duties that are, or may by law be required of them, then the above bond to be void, otherwise to remain in full force and effect."

The declaration avers, that John Spencer duly made his last will and testament, which was admitted to probate after his death; that Edward B. Elliott and Thompson Windham, with one Marr, were appointed executors thereof, and that letters testamentary were duly issued to said Edward B. Elliott and Thompson Windham, who gave the bond refered to, and took upon themselves the duties of executors. It also avers, that the testator, by his last will, amongst other legacies, gave to his two grand-children, Henry W. Spencer and Sarah Jane Spencer, who has since intermarried with one Massey, for whose use this suit is brought, one-eighth part of the resi-

due of his estate, to be kept and lent out by his executors, until the said Henry W. Spencer, or the said Sarah Jane, should marry or become of age, and then to be equally divided between them. It further avers, that afterwards, on the 14th day of January 1831, a final settlement and distribution of the estate of the testator, was had in the Orphans' Court of Tuskaloosa county, and that on said settlement it was ordered and decreed, that Edward B. Elliott, executor as aforesaid, pay to Sarah J. Spencer 567 97-100 dollars, as by the record of said final settlement and decree remaining on file will more fully and at large appear. The declaration further avers, that a large amount of assets came to the hands of the executors, more than sufficient to satisfy said decree, and which were liable to pay the same, but that said Edward B. Elliott had failed to pay said sum of money, named in said decree, and had removed from the State to parts unknown—whereby the defendant had become liable, &c.

To this declaration there was a demurrer which was overruled, and the defendant then craved oyer of the bond, and filed twelve pleas, which were demurred to and the demurrers sustained. The pleas, so far as it is necessary to notice them, are set out in the opinion of the court. The several rulings of the court are assigned as error.

PORTER, for plaintiff in error.

1. The allegation of money, ascertained by decree to be due by the administrator to the distributee, is not a sufficient breach. Mitchell v. Connolly, 1 Bail. 203.

2. Suit cannot be sustained against sureties of an executor on the bond, at the suit of the distributee, without a judgment against the administrator. Jones v. Anderson, 4 McCord, 113.

3. A legatee cannot recover against the surety a sum decreed, unless other proceedings be had as evidence of waste of assets by administrator, which should have been applied to the legacy. 1 Lomax on Ex'ors, 179; Taylor v. Stewart, 5 Call. 520; Hairston v. Hughes, 3 Munf. 568.

4. The declaration should have avered a settlement, and a sufficient amount of assets on hand, after the payment of all debts.

5. A devastavit should be established, either by decree, or

by a separate suit; and a refunding bond tendered. 3 How. M. R. 257, Carmichael v. Browder. .

6. The decree set out here, did not authorise a suit on the bond. What is shewn is no breach of it. Vick v. House, et al. adm'r, 2 Howard, M. R. 617; Judge, &c. v. Phipps, 5 Howard, M. R. 59.

7. The court unquestionably erred in overruling the several pleas of defendant. The pleas are good in themselves, and the court could not say on the issues before it, they could not be sustained by proof.

Peck, contra.

DARGAN, J.—We consider it settled by the decisions of this court, that a legatee or distributee may sue the executor or administrator and his securities on the bond, to recover a legacy or distributive share after a final settlement of the estate has been made in the Orphans' Court, and the amount due to such legatee or distributee ascertained by the decree of the court and ordered to be paid. Judge of the County Court of Madison v. Looney, et. al. 2 Stew. & Por. 70; Judge of the County Court of Limestone v. French, 3 Stew. & Por. 263; Same v. Coalter, 3 do. 348. And when we reflect that the Orphans' Court has full jurisdiction to make final settlements of decedents' estates, and to decree the payment of the assets to those entitled, either as distributees or legatees, it must be apparent that when such decree is rendered, it is conclusive on the administrator; and if he then refuse to pay the amount thus ascertained, such refusal must be a breach of the condition of his bond, which is, that he will perform all the duties required of him by law as such executor—and if there has been a breach of the bond, and the amount ascertained to which the party aggrieved by the breach is entitled, by a judicial proceeding, to which the administrator was a party, there can be no reason for requiring further proceedings, before the bond can be put in suit. This view shows, that the declaration is sufficient, as it alleges the bequest, the rendition of the final decree in favor of the plaintiff, and the refusal to pay.

The next questions arise on the sufficiency of the pleas,

which were demurred to, and to which demurrers were sustained.

The first plea alleges, that at the March Term of the Circuit Court of Tuskaloosa County, A. D. 1841, Marmaduke Williams, then Judge of the County Court of Tuskaloosa, impleaded the said defendant and Edward B. Elliott, the executor, in a certain action of debt to his damage ten thousand dollars, founded on the identical same writing obligatory and condition, in the plaintiff's declaration *described*, and declared on the same writing obligatory by the description of Marmaduke Williams, Judge of the County Court of Tuskaloosa County, and successor in office of Erasmus Walker, &c.; and in his said declaration, assigned the same breaches mentioned in the declaration in this behalf; to which, the defendants filed a general demurrer, and thereupon such proceedings were had, that, by the judgment of said Circuit Court, it was considered that the demurrer be sustained, and the defendant go hence, &c.

A demurrer admits all the facts well pleaded, and demands the judgment of law arising on those facts; and when the judgment is pronounced it must be conclusive upon the parties, and as effectually determine the litigation as if judgment had been rendered on verdict. But if the demurrer be sustained for some defect in the pleadings, and judgment is not pronounced on the merits of the case, then there has been no judgment on the facts or merits, and consequently the demurrer which was sustained, because of defect in the pleadings, can form no bar to a subsequent action. See 1 Chitty's Plead. 198. So if a declaration in assumpsit is bad, and the defendant, instead of demurring, plead an insufficient plea, to which the plaintiff demurs, and judgment is given against plaintiff because of the insufficiency of his declaration, and the plaintiff afterwards sue and declare *aright*, to which the defendant pleads the judgment on demurrer to the former suit, reciting the record in *hæc verba*, this is not a good plea, for, without question, the plaintiff having committed a mistake in his first declaration may set it right in a second action. Bac. Abridg. Vol. 7, Tit. Pleadings, page 636. From these authorities, it is manifest that the plea of judgment in a former suit upon demurrer, must show, that the judgment was pronounced on the merits of the case; for the plea is a bar only

when the judgment was rendered on the *merits*. If the plea therefore set forth the record of the former suit, and it is apparent that no judgment could have been rendered for the plaintiff, owing to the defective manner in which the suit was brought, or the pleadings made up, without regard to the merits, the plea is bad, for it creates no bar to the action. The record set forth in this plea, shows that the suit was brought by Marmaduke Williams, the Judge of the County Court of Tuscaloosa County; but it does not show that it was brought for *the use* of any one. The Judge of the County Court cannot sue in his own name and recover of an executor and his securities for a breach of *the bond;* but the party injured alone can sue, and the suit must be in the name of the County Judge *for his use*. It is clear that a suit in the name of the County Judge alone, and not for *the use* of any one, is no bar to a suit for the use of the party aggrieved. The demurrer to the first plea was, therefore, properly sustained.

The 6th plea sets out the will *verbatim*, and avers, that by the will, the executors were appointed trustees, to keep the legacy bequeathed to the plaintiff for her use and benefit, and that said legacy did not come to the possession of said executor, as executor, but as trustee. The portion of the will that gives rise to this plea, is in the following language: "The remaining part of my estate, after paying my debts, and the special bequests herein stated, shall be divided as follows: 1. Henry Spencer and Sarah Jane Spencer, children of my son John Spencer, shall have one-eighth part, to be kept and loaned out upon interest *by my executors*, until either may marry or arrive at lawful age, then said eighth part to be equally divided between them." We do not think that the testator deigned that his executors should take and hold this legacy freed from their character as executors. The legacy *is not bequeathed* to them in trust, nor can they claim any title to it, but in their character as executors. The power given to them to lend it out upon interest is given to them as executors, and we do not think they could claim to exercise that power in any other character or capacity. The correct rule on this subject is, that the executor shall be considered as holding the legacy in his character as executor, unless it clearly appears from the will, that the testator intended that it should be held by him as

trustee and not as executor. See 10 Gill. & Johnson, 27. But even if it were conceded that the executors by this will were clothed with power over the legacy as trustees, independent of their character as executors, and after they had elected to hold the legacy as trustees, and not as executors, that their liability as executors ceased, and their securities discharged from further responsibility—yet it is manifest that they can come into possession of the funds only as executors in the first instance, and it is in that character and in that alone, that the assets came to their possession—and it was in that character the final settlement was made, and we could not infer that they elected to hold the legacy in their *character of trustees*, and *not as executors*, unless there be some act done by them, clearly indicating the intention to hold as trustees, and not as executors. Before we could pronounce that the executors held the legacy as *trustees*, we must be able distinctly to see, that they looked upon the fund not as assets of the estate, but as a legacy in their hands *as trustees* for the use of the legatee. If, therefore, the executors had been appointed trustees by the will, independent of their character as executors, and they had elected to hold the legacy as trustees and not as executors, and after this election, the fund had been lost, the securities would not have been liable for their default as trustees merely; but that they have elected to hold the fund as trustees, and not as executors, must be made to appear by some plain and unequivocal act; and as there is no act, from which the intention to hold the fund as trustees could be infered, we could not pronounce that they ever did intend to hold it as trustees. We know they *received it as executors*, and if they held it in any other capacity, it should have been made distinctly to appear by some act plainly manifesting that intent. 9 Metcalf's Reports, 525. We come therefore to the conclusion, that the will does not clothe the executors with the character of trustees, independent of their character as executors, and even if it did, that the plaintiff in error would be responsible for any default previous to some act that would make manifest the intention to hold *as trustees*, and *not as executors*. The plea therefore, in any point of view, was insufficient.

The 7th plea avers, that at the time of making the settle-

ment and the rendition of the decree, the executor had fully administered all the assets that had come to his hands, in the payment of debts and legacies, which were to be paid before the legacies bequeathed to the plaintiff. In the case of Williams v. Howell, 4 Alabama Reports, 693, this court held, that a surety of an administrator in the absence of fraud was concluded by a settlement made with his principal in the Orphans' Court. In that case, the securities filed a bill for relief, alleging that the administrator, in his settlement, did not credit himself with amounts to which he was entitled, and that these credits were omitted with the intent to swell the distributive shares of each distributee, and that the administrator was insolvent. The proof however failed to establish any fraud in the settlement, and the court said, "that it was the duty of the administrator to settle his accounts in the Orphans' Court, and if in the performance of this duty a sum of money is ascertained to be due from him to the estate, and a decree is rendered against him, that both the administrator and his securities are concluded by it." The court relied on the authority of the case of Townsend & Gordon v. Everett, 4 Ala. 607, in which it was held, that a security of a County Treasurer, was bound by the annual settlements made by his principal, and his statements made to his successors in office, showing the amount of public money in his hands, because the law required him to do those acts. Under the influence of these decisions, we must hold, that in as much as the law requires executors and administrators to make final settlements of the estates they represent, that the decrees rendered by the Orphans' Court upon such settlements are conclusive, alike on the administrator and his securities, unless successfully impeached for fraud. The demurrer to the 7th plea was properly sustained, as this plea contains no allegation of fraud in the settlement and decree of the Orphans' Court.

These are the only pleas that have been attempted to be sustained in the argument of counsel, and we do not think it necessary to examine the others at length. We see no error in sustaining the demurrer to them, and the judgment must be affirmed.

PERKINS *vs.* MOORE, JUDGE, &c.

1. A judgment on general demurrer to the declaration is a judgment on the merits, and is conclusive in a subsequent suit on the same cause of action.
2. A plea of former recovery, which avers "that the plaintiff impleaded the defendant and one E. B. & E. E. in a previous action of debt, on the same bond and condition now sued upon, and in the same Court, and assigned in his declaration the same breaches of the condition of said bond now assigned," &c., identifies with sufficient certainty the two causes of action.

Error to the Circuit Court of Tuscaloosa. Tried before the Hon. John D. Phelan.

THIS was an action of debt, instituted in the name of the defendant, for the use of Isaac N. Mayfield and wife, against the plaintiff in error, as a security on the bond of Edward B. Elliott, Executor of John Spencer, deceased. The facts of the case appear fully in the opinion of the Court.

J. B. CLARKE and PORTER for plaintiff.—1. A judgment on a general demurrer to a declaration is a final judgment on the merits. Gould's Pleading, 477, §§ 43–44; Bacon's Ab., title Pleas and Pleading—Demurrer 4.

II. A plea of a former judgment for the defendant on a general demurrer to a delaration, stating the same identical cause of action and breach, is a complete bar to the action. Gould's P. 478, Sec. 45.

III. A plea of a former judgment for the defendant on a general demurrer to a declaration, stating the same identical cause of action and breach, creates a complete bar, unless such bar be avoided by replication. 1 Chit. Pl. 198, 214, 540; 1 Mod R. 207; Viner's Ab. title, "Judgment," 2–4; 3 Chit. Pl. 928, 930, and 1062.

PECK for defendant.—I. As to the plea of former judgment on demurrer, against the defendants in error, I refer the court to Wilber v. Gilman, 21 Pickering, 250, 253; Knox v. Waldoborough, 5 Greenleaf, 185; 1. Mod Rep. 207; 1 Ch.

Pl. 198, 199, and note 3; 2 Wm. Blackstone, 827; 3 Ch. Pl. 928, 956.

A plea of former judgment need not state the issue, upon which the judgment was rendered; it need not state whether it was an issue of fact, or of law. On such plea, the judgment is *prima facie* conclusive, and in such case, the plaintiff must reply that it was not a judgment on the merits, but if the plea shows, that the judgment was not on the merits, the plaintiff may demur.

CHILTON J. No objection is brought to our view, to the declaration in this case. It is in the usual form and contains every averment necessary to make it good. It is upon the bond of the executor, against whom the plaintiffs below have a judgment in the Orphan's Court, with a return of *nulla bona*, upon an execution issued thereon. This, according to our numerous decisions, is sufficient to entitle the plaintiffs below to their action.

The several pleas which were filed in this case, except the first, have passed under our revision, in the case of Perkins et al v. Moore, Judge, &c., at the present term, and were held bad. It is therefore unnecessary to notice them in this opinion. We will confine our examination to the first plea.

This avers, that the plaintiff impleaded the defendant, and one E. B. and Enoch Elliott, in a previous action of debt, on the same bond and condition now sued upon, and in the same court, and assigned in his declaration the same breaches of the condition of said bond now assigned: That the said defendants in said previous suit demurred to said declaration, which demurrer was sustained by the court, and thereupon such proceedings had, as that judgment was rendered in said suit, that the said defendants go hence and receive their costs, which said judgment, it is insisted, is in full force and unreversed, &c.

To this plea, a demurrer was interposed, and sustained in the primary court. It is here insisted that the judgment in the former suit, not being on the merits, but shown by the plea to have been upon demurrer, should not bar a subsequent action. This doctrine seems to have received some countenance from this court under its old organization, as appears by the case

of Pace v. Dossey 1 Stew. Rep. 20; see also 2 S. and P. 341. But the correct doctrine is, that a judgment on a general demurrer to a declaration is a judgment on the merits, and conclusive upon a subsequent action for the same cause. In this case, a majority of the court are of opinion, that the plea, although it does not set out the record of the former judgment, sufficiently identifies the two declarations, to satisfy them, that they are substantially the same, and being the same, the judgment on demurrer is a good bar. Gould on Pl. 478; 1 Chit. Pl. 198, 214, 540. I have not been able to agree with my brethren in respect to the identity of the two causes of action, or rather of the two declarations. In my judgment, the plea, being in the nature of an estoppel, cannot be aided by any intendment; and this declaration being confessedly good, we cannot therefore intend that the former declaration, although it averred the same breaches of the same bond, averred them in the same way; for if this intendment were indulged, it would amount to a presumption, that the court, upon the trial of the first case acted improperly, and decided against the law. I think it better conforms to the law, governing the doctrine of legal intendment, to presume that the same breaches, now assigned upon the condition of this bond, were imperfectly assigned in the first declaration.

It will be observed, that this plea is unlike any of the forms furnished by the books, and we have looked in vain for a precedent to guide us. The usual mode is for the defendant to plead the former judgment in bar. This plea does not show whether the judgment was upon the merits, or otherwise; but if the judgment was not upon the merits, but was rendered upon a defect in the declaration, then the practice is for the plaintiff to reply this matter. In the case at bar, however, the plea itself shows that the former judgment was upon a demurrer to the declaration, and showing this, in my opinion, the legal intendment is that the declaration in the first case was defective, and unlike the declaration in this case, which is manifestly good; and the pleader having thus raised a presumption adverse to his plea, should have gone further, and have averred not only, that the two declarations contained the same identical breaches, on the identical same condition of the bond, but that all the other collateral facts, necessary to

give point to the breaches, were identical. My brethren think the plea in substance does this, and that the demurrer to it was improperly sustained. According to the rules of law, which in my judgment apply, the plea, which is purely technical, and which, being a plea in estoppel, should not be aided by intendment, does not sufficiently exclude the presumption, which the law raises of a defect in the first declaration. The judgment pleaded must be upon the merits—1. Greenl. Ev. 530 and citations.

Let the judgment of the Circuit Court be reversed, and the cause remanded, that the plaintiff, if he desire it, be allowed to reply, and such proceedings be had, as shall conform to the views of a majority of the court.

DEARING *vs.* WATKINS.

1. An unregistered mortgage is valid and operative against subsequent purchasers, with notice. The fact that the mortgage was executed in another State, whilst the property was in this, cannot affect the principle.
2. The retention of possession, by the mortgagor, after the law day has elapsed, is not *prima facie* evidence of fraud: It is, at most, but a circumstance from which fraud may be inferred.

Error to the Circuit Court of Lawrence. Tried before the Hon. Thomas A. Walker.

This was an action of detinue by the plaintiff in error against the defendant for the recovery of a slave and damages for his detention. The plaintiff claimed title under a mortgage executed to him on the 24th October, 1840, by James Jackson, the consideration and *bona fides* of which were admitted. The mortgage was executed in the State of Georgia on property in this State, and the debt, which it was intended to secure, became due on the 1st January, 1841. The defendant relied for his defence on a bill of sale from said James Jackson, dated the 10th January 1842, the consideration paid being a note of said Jackson for $662 held by the defendant,

and which was extinguished by the purchase. The slave was owned by Jackson as far back as 1832, had continued in his possesion in Alabama up to the date of the purchase by the defendant, and was then delivered to him. It was admitted that the mortgage had never been recorded in this State, but the defendant had actual notice of it at and before his purchase. The court upon this state of facts charged the jury, 1st. That although the mortgage was valid between the parties both in the State of Georgia and in this State, yet, as to subsequent purchasers and creditors in this State, who became such after the law day had elapsed, it was fraudulent and void, notwithstanding such purchasers and creditors had actual notice of its existence, unless it had been duly recorded in this State in accordance with the requirement of the statute.

2. That if the mortgagor was permitted to retain possession of the slave, after the law day of the mortgage had elapsed, it was *prima facie* evidence of fraud, and required explanation.

To these charges the plaintiff excepted, and now assigns them as error.

T. M. PETERS for plaintiff.

1. Under the acts of 1823 and 1828, which, if any do, apply in this case, *actual* notice renders registration unnecessary. The act of 1803 does not apply, as the mortgage was on consideration deemed valuable in law. Clay's D. 255, §§ 5, 4, 3; Smith v. Zurcher, 9 Ala. 208; Bolling v. Carter et al., 9 Ala. 921, 923; 3 Stew. 233; Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866; 1 Story Eq. § 403; 10 Ala. 682; 4 Ala. 469.

2. The retention of possession by the mortgagor of personal property after the law day is passed, is not *prima facie* evidence of fraud. It must be shown that there is fraud before fraud need be rebutted: fraud is not a presumption of law, but a fact to be proven. Simerson v. Br. Bank at Decatur, 12 Ala. 205, 212, 213; Willis v. P. & M. Bank, 5 Ala. 781; 1 Story Eq.

3. The mortgage, under which the plaintiff claims, having been made and delivered in the State of Georgia, by a resident citizen of that State, and conveying property in this State at the time of the execution of the mortgage, is not affected by the act of 11th January, 1828. The language of this act is

descriptive only of such conveyances as have been made by parties residing in this State. It is not ambiguous. It cannot therefore be extended by construction to others not mentioned. *Expressio unius est exclusio alterius*, is the law of statutes as well as contracts. Conveyances so circumstanced are also excluded by the acts of 1803 and 1823, as their language does not embrace it; and as State laws have no force *extra territorium*, (12 Ala. 53, 42,) this State never *intended* its enactments to operate on foreign contracts. Clay's Dig. §§ 5, 4, 3; Caterlin v. Hardy, 10 Ala. 514; Adams v. Broughton, 13 Ala. 731; 2 Dwarris Stats. 712; Rex v. Cunningham, 5 East. 478; Broom's Max. 278; Co. Litt. 210.

L. P. Walker for defendant.

1. It is contended for the plaintiff in error, that as to Watkins the mortgage is certainly valid, although not registered in time, he having actual notice of its existence. *Actual* notice of the existence of the mortgage is *equivalent* to the *constructive* notice afforded by registration. *E contra*—We contend that the absence of any certificate of probate or acknowledgment defeats the validity of the mortgage, even with *actual* notice. To authorize the registration of such a deed, it must be *acknowledged* by the maker thereof, or be *probated* by one of the subscribing witnesses thereto, before one of the officers named in the act. Clay's Dig. 153, §§ 7 & 8—p. 256, § 7; 8 Ala. 360. The statute requires the *certified* oath of the witness that he saw the maker of the deed execute it—a very different thing from the mere subscription of a name, which the clerk of a court certifies is a genuine signature. Although registration upon an *acknowledgment* or *probate* defective or irregular in form, may be valid and operative as constructive notice, yet a registration without *some* acknowledgment or probate is a nullity, and therefore no notice. These conditions *must* be complied with, otherwise the party has no right to have his deed registered, and the clerk no authority to *record* it; and an act illegally done can possess no virtue and confers no rights. 8 Ala. 360; 4 Ala. 469; 5 Ala. 297; 2 Ala. 203; 5 Porter, 413; 3 Cranch, 140, 155; 4 Kent, 174. Therefore, the mortgage would be invalid, even if recorded in time—its registration being illegal and unauthorized. How can *actual*

notice put the plaintiff in a better condition than *registration* would have done? 8 Ala. 866 makes actual notice of the existence of the deed *equivalent* to the constructive notice afforded by *registration*—that is, that the former is a good substitute for the latter. But as the registration, even within the thirty days, is of no avail unless the mortgage has been previously *probated* or acknowledged, so neither is *actual* notice—because, being a mere substitute for the former, it cannot effect more than that could have done. *Actual* notice being *merely equivalent* (8 Ala. 866) to *constructive* notice, cannot, of course, dispense with any of the steps or formalities essential to the validity of constructive notice. The actual notice must be of a mortgage *fit for registration*, which is not the case until it is probated or acknowledged. *Actual* notice is equivalent to *registration*, but not to registration *and* probate. Until its execution is proved or acknowledged, it is not a mortgage. Up to this, there is a *locus penitentiæ*. It is an *inchoate* instrument, a knowledge of which operates as a mere declaration of an intention on the part of the grantor. The actual notice must be of a *perfected* lien.

2. The possession of the negroes by Jackson after default in the payment of the notes for the security of which he gave the mortgage, raises the presumption of fraud, and must be rebutted by the plaintiff. 5 Ala. 303, 336, 374; 6 Ala. 185; 4 Ala. 469; 7 Ala. 262; 7 Ala. 690; 4 Hill's (N. Y.) Rep. 272, 308–10–11.

The instrument offered in evidence to support Dearing's title is not an *absolute* bill of sale. It was liable to be made void upon payment of the money intended to be secured, and therefore does not come within the rule laid down in P. & M. Bk. of Mobile v. Borland (5 Ala. 531, 549); nor is it a *conditional* sale, because the debt intended to be secured was not discharged—this is necessary to a conditional sale, (4 Kent, 145, note *a*); but it is a *mortgage*, vesting the title and possession at once in the mortgagee, subject to defeasance upon payment of the notes to Dearing at the time appointed. Jackson's possession, then, was inconsistent with the terms of the mortgage, and therefore a *badge* of fraud, which it was Dearing's duty to explain. 5 Ala. 303, 336, 374; 6 Ala. 185; 7 Ala. 262, 690; 4 Ala. 469; 4 Hill's (N. Y.) Rep. 272, 308–10–11.

DARGAN, J.—Although a mortgage be not recorded, yet if one with actual notice purchase the mortgaged property of the mortgagor, he buys subject to the mortgage, and as against him the mortgage cannot be considered invalid, because it has not been recorded in the manner prescribed by the statutes. This has been so often determined by this court, that it cannot now be considered as a question open to controversy. Smith v. Zurcher, 9, Ala. 208; Bolling v. Carter, et al, 9 Ala. 921, Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866; 4 Ala. 469. These decisions accord with decisions of other States on statutes similar to our own, (See 4 Halst. 193; 1 Pick. 164; 1 Metc. Rep. 214,) and in our judgment harmonize with the reason upon which the statutes were made.

The object of registration laws is, to give *notice* that subsequent purchasers and creditors be not deceived; and if one purchase with actual notice, he is in possession of that information that the Statute intended to place within his reach. If he buys the mortgaged property, with notice of the mortgage, he cannot complain that he has been deceived or defrauded.

The argument, however, in this case, assumes that the mortgage deed is inchoate or incomplete, until it is duly acknowledged or probated in a manner that would authorize its being recorded; and as the mortgage, which is the foundation of the plaintiff's title, has never been acknowledged, it is invalid as against a subsequent purchaser with notice. A mortgage deed, like all others, is perfect and complete between the parties thereto, when signed, sealed and delivered. The law does not require it to be probated or recorded in order to give it validity, as between the parties to it, but requires its registration merely that all may have an opportunity to know of the existence of the deed.

The charge of the court goes on the ground, that the mortgage is invalid as against a purchaser with actual notice, because it was executed in Georgia, conveying property in Alabama. We can see no reason for such a distinction. It was a valid deed between the parties in Georgia, and equally so here; and as the defendant had actual notice of it, he stands in the same relation to it as if the deed had been duly proved and recorded.

We might have closed this case, and sent it back for another trial, but as there is another question presented, which may become a material inquiry in a subsequent trial, we propose briefly to express our opinion upon it. The court charged the jury that if the mortgagor retained the possession of the slaves, after the law day had passed, that this was *prima facie* evidence of fraud. In the case of the Plan. and Mer. Bank, v. Willis, 5. Ala. 770, it is said, "that if the seller of personal property retains the possession after the execution of an absolute bill of sale, the transaction is *prima facie fraudulent*, and to free it from this legal imputation, the purchaser must show some special reason why the possession did not accompany the transfer. But the same rule cannot be applied to a mortgage of a chattel, although the mortgagor fail to pay the debt intended to be secured thereby. And although the mortgagee do not take immediate possession, or commence suit by bill in equity or otherwise, it cannot be assumed as a conclusion of law that the mortgage is fraudulent. The doctrine laid down in this case is recognized in the subsequent case of Limerson v. the Br. Bank at Decatur, and we will here add that it meets our approbation.

I understand, that when the law will *prima facie* presume fraud, because the possessson does not follow the transfer, that this legal presumption of fraud arising from the retention of possession, will not be rebutted or explained by mere proof, that the consideration of the transfer was *bona fide*; but in addition to this, the vendee or claimant must show some sufficient *reason*, why the possesssion was permitted to remain with the vendor. Now a mortgage is a mere security for a debt: The mortgagee may file his bill in equity to foreclose and sell, without troubling himself with the possession, or he may sue at law; the debt is the principal, the mortgage the security, and the law cannot denounce a mortgage as fraudulent, simply because the mortgagee does not take possession on the day the condition is forfeited.

If no suit be commenced, nor the possession changed, but it is permitted to continue with the mortgagor, these are circumstances to be weighed by the Jury, if the *bona fides* of the mortgage is assailed; and these circumstances will have the more weight, the longer the possession is retained without

any demand being made for the property, or suit commenced. The jury will weigh these circumstances, in connexion with all the proof, in coming to a conclusion, whether the deed is fraudulent or not; but the law cannot pronounce a mortgage fraudulent, because the mortgagor retains the possession of the chattel after the law day is past.

As the ruling of the Circuit Court was opposed to the view here taken, the judgment must be reversed and the cause remanded.

WALKER *vs.* HALE ET AL.

1. If a motion is made for a new trial, during the Term at which a case is tried, the Court may continue, and dispose of it at a succeeding Term.
2. If a party moves for a new trial, but without awaiting the action of the Court, prosecutes a writ of error to this Court, where the judgment is affirmed, the primary Court has no longer the power to grant his motion.
3. A writ of error will not lie on the order of an inferior Court granting a new trial.

Error to the Orphans' Court of Talladega.

At the October Term, 1847, of the Orphans' Court of Talladega, the plaintiff in error propounded for probate a paper purporting to be the last will of David Walker, deceased. The next of kin having appeared and entered their *caveat*, an issue was made up and submitted to a jury, who returned their verdict, establishing the instrument as the will of the deceased, and a decree was rendered in accordance therewith. In the progress of the trial, a bill of exceptions was taken, and subsequently a motion was made for a new trial, which was continued by the court. The record does not disclose that any further action was had on the motion, until the 15th of June 1848, when the contestants moved the court to grant the motion. The plaintiff in error appeared by counsel, and alleged several reasons why the motion should not be then granted, and amongst others, that the contestants had sued out a writ

of error to the Supreme Court, to reverse the decree probating the will, and that it had, at the January Term, 1848, of the said Supreme Court, been affirmed. All the objections were overruled by the Judge, the motion was granted, and a new trial ordered. To reverse this order, a writ of error is prosecuted to this court.

McAfee for plaintiff.

Rice & Morgan, contra, submitted a motion to dismiss the writ of error.

DARGAN, J. A court cannot grant a new trial, after the term is closed, at which the cause was tried, unless a motion during the term be made, and for some cause continued until the next term; but if the motion is made, the legal effect of it is to retain the matter for that purpose, under the control of the court. The cause is said still to be *in fieri*, by reason of the motion; and the court may make any order afterwards that may be proper. Reese v. Billings, 9 Ala. 263; 3 Ala. 746; Stephenson v. Mansony, 4 Ala. 317. Yet there must be an end of litigation, and a time must come when the power of the court over the judgment must cease, notwithstanding the motion may not have been disposed of. If, instead of pressing for the action of the court on the motion, the party takes a writ of error to the Supreme Court, and the cause is there heard and determined, and the judgment is affirmed, the judgment is final, and the inferior court no longer retains the power to grant a new trial. The Orphans' Court had no authority to grant the motion, if it was made to appear that the final decree probating the will had been affirmed by this court.

But a writ of error is not the proper remedy to correct the erroneous act of the county Judge. This writ can only be issued to revise a final sentence, judgment, or decree. The granting of a new trial is neither of these.

Let the writ of error be dismissed.

DEARING *vs.* LIGHTFOOT.

1. A written power to an agent, in charge of the plantation of his principal, "to act for him in all cases whatever, and to do all which he might himself do," coupled with subsequent verbal instructions, when about to break up the plantation and remove his family to another State, "to settle up or discharge all demands against the family before he (the agent) left, and, acting under the power of attorney; to do all that might be necessary," will not confer on the agent the authority to sell the slaves of his principal.
2. If an agent, transcending his authority, sells the slaves of his principal, and the principal ratifies the act, the purchaser is entitled to hold the slavrs as against a prior unregistered mortgage, of which he had no notice at the time of such ratification.
3. The fact that a mortgage on property in this State is executed in another State, does not dispense with the necessity of registration in order to give it validity as against creditors and subsequent purchasers.

Error to the Circuit Court of Lawrence. Tried before the the Hon. George W. Lane.

This was an action of detinue by the plaintiff against the defendant in error to recover the possession of two slaves and damages for their detention. The plaintiff relied on a mortgage on the slaves in controversy, executed by one James Jackson, in the State of Georgia, to the said plaintiff, on the 24th October 1840. The defendant claimed title under a bill of sale from Dr. Henry M. Jackson, acting as the agent of the said James Jackson, bearing date in January 1842. Both James and Dr. Henry M. Jackson were examined under commission as witnesses. The former testified, that the slaves, at the execution of the mortgage, were on his plantation in Lawrence county, to which they had been removed by him from Tennessee in 1832: that when he left Courtland in December 1841, to return to Georgia, whence he intended removing his family, he gave "no special authority to Dr. Jackson to sell the two boys, Solomon and Hercules, but that he had some years before given him a general power of attorney to act for him in all cases whatever, and to do all which he himself might do: that in parting with his son, (Dr. Jackson) he told him to settle up all demands against the family, before he, the said Dr.,

should set off for Montgomery, and acting under the power of attorney above to do all that might be necessary." This witness further stated, that the slaves in controversy were sold by his son, Dr. Jackson, to the defendant, "under a general power, verbally given, to discharge all demands against the family before he left Courtland for Montgomery." Dr. Jackson testified to the sale of the slaves to defendant by himself, "acting under a general power of attorney, (since lost or destroyed) from the said James Jackson, to manage all his business in the State of Alabama:" and that the purchase money was paid, by the defendant assuming two debts due by said James Jackson, to the amount of about eight hundred dollars and handing to the witness two hundred dollars in cash. There was other testimony, but it has no bearing on the questions involved in the case.

The plaintiff's counsel asked the court to charge the jury;

1st. That the agency of Dr. Henry M. Jackson, as set forth in his own and his father's depositions, was insufficient in law, to authorize the sale by him of the slaves Solomon and Hercules to the defendant, so as to vest the title of the said James Jackson in him:

2d. That if the defendant claimed under a purchase from Henry M. Jackson, as the agent of James Jackson, the agency shown in the testimony did not authorize the said Henry M. Jackson to sell the slaves to the said defendant, or any other person under whom defendant may claim.

The court refused to give either of these charges, to which refusal the plaintiff excepted, and now assigns it as error.

Thomas M. Peters, for plaintiff in error:

1. The mortgage in this case having been made in the State of Georgia, by parties residing at the time in that State, when at the same time the property conveyed was in this State, its registration here is not required to make it valid. Catterlin v. Hardy, 10 Ala. 514; Adams v. Broughton, adm'r, 13 Ala. 731. See brief in Dearing v. Watkins.

2. Generally, powers of attorney being special grants, are to be strictly construed, and the agent is restrained by the terms conferring his authority as applied to the subject matter of his agency. Beyond these, he cannot be allowed to go without the greatest mischiefs. A lax construction of an agent's

powers would put an end to the exercise to all corporate powers and an infinity of commercial transactions of every day's occurrence, which are almost necessarily done by agents. Here the *business* of the principal in Lawrence county, was "planting" or farming—nothing else, and the agent was clothed with powers to manage this interest—nothing more. But an agent to manage a farm has no power to sell it, or the things belonging to it: this would be a mode of *breaking* it up but not of carrying it on. Dig. Lib. Tit. 3, 1, 63; Pothier 3, Tit. 3. 64; Cod. Lib. Tit. 13, l. 16; Story on Agency, 86, § 71, et seq: Story Agen. 21, 143, §§ 21, 126 et seq. and cases there cited; Scarborough v. Reynolds, 14 Ala. 252; Rosseter v. Rosseter, 8 Wend. 494; Smith Mer. Law, Holcombe & Gholson's editor ch. 5, p. 54, and notes.

3. There is no pretence that Dr. Jackson, had any express authority to sell the slaves here sued for, and it is denied that his general power of attorney to manage his father's business in Alabama conferred it. The charges asked were therefore proper and should have been given in the language requested. Cole v. Spann, 13 Ala. 537; Hinton v. Nelms, 13 Ala. 222; Clealand v. Walker, 11 Ala. 1059; Ivey v. Phifer, 11 Ala. 535.

4. The plaintiff shows the better title and ought to have recovered.

L. P. WALKER, for defendant in error, contends that there is no error in the record, and cites 2 H. Black. R. 623, Howard v. Baillie; Story's Ag. §§ 62, 85, 86, 89, 91, 239.

COLLIER, C. J.—Powers of attorney are ordinarily subjected to a strict construction, and the authority is never extended beyond that which is given in terms, or is necessary and proper for carrying the authority so given into full effect. Consequently a power to sell, assign and transfer stock, will not include a power to pledge them for the agent's own debt. Nor will a power to bargain and sell land, include an authority to grant a license to the purchaser, previous to a conveyance, to enter and cut timber on the land, though done *bona fide* with a view to effect the sale. Story on Ag. § 68. An authority to manage the property of the principal has been held not to entitle the agent to alienate any part of it, except

that which was perishable. So an agent with power to superintend a farm, does not possess the power to sell it, or the things belonging to it. Id. § 71.

But in all cases, whether the agency be general or special, it is said to be a universal principle, that unless the inference is expressly excluded by other circumstances, it includes all the usual modes and means of accomplishing the objects and ends of the agency. Even an immaterial deviation by the agent from the appropriate course, will not vitiate his act, if he does not in substance exceed his right and duty. Story on Ag. § 85.

A power of attorney to collect debts, to execute deeds of lands, to accomplish a complete adjustment of all concerns of the constituent in a particular place, and to do all other acts which the constituent could do in person, does not authorize the giving a note by the attorney in the principal's name. The larger grant of power it was supposed should be construed with reference to the matters specially mentioned. Rossiter v. Rossiter, 8 Wend. Rep. 494. So a power of attorney "to ask, demand, sue for, recover, and receive all such sum or sums of money, debts, dues, accounts and other demands whatsoever, which are, or shall be due, owing, payable, and belonging to us, or detained from us in any manner of ways or means whatsoever, &c." does not authorize the attorney to compound for, receive and release a sum of money which is not due and payable. Hefferman v. Adams, 7 Watt's Rep. 716.

In Wood v. McCain, 7 Ala. Rep. 800, S., a practising physician, being about to leave home temporarily, made R. his agent by verbal appointment, with a general authority to transact all business for him in this State, and left with him his books and accounts for professional services "for settlement." It was held, that as it respected the books and accounts, the authority of the agent was restricted by the terms "for settlement;" and he was not authorised to assign them to a surety of his principal, to indemnify the surety against the consequences of his suretyship. In this case, the distinction between a *general* and a *universal* agent is recognized, and it was said that such an universal authority, as the latter may exercise, will never be inferred from any general expressions

however broad, but the law will restrain them to the particular business of the party, in respect to which, it is presumed, his intention to delegate the authority was principally directed. Thus, if a merchant in view of his temporary absence should delegate to an agent, the full and entire authority to sell his personal property, to buy any property for him, or on his account, or to make any contracts, or to do any acts whatsoever, which he could if personally present: These general terms would be limited to buying or selling, connected with his ordinary business as a merchant, and without some more specific designation, would not be construed to apply to a sale of his household furniture. See also Story on Ag. § 21.

The difference between a *general* and *special* agent, is said to be this: the former is appointed to act in the affairs of his principal generally, and the latter to act concerning some particular object. In the former case, the principal will be bound by the acts of his agent, *within the scope of the general authority conferred on him*, although those acts are violative of his private instructions and directions. In the latter case, if the agent exceeds the special authority conferred on him, the principal is not bound by his acts. Wood v. McCain, *supra;* Paley on Ag. 199; 15 Johns. Rep. 44; Story on Ag. §§ 21–22–125–126–127. See also Scarborough v. Reynolds, 12 Ala. 252. In the latter case, it was decided that a special authority conferred upon an agent, in the management of a plantation and the interests connected with it, to demand and sue for all monies, &c., the principal declaring that he subjected himself to be sued through his agent in the same manner as if he were personally present, does not give the agent power to execute a note in the name of the principal; nor does it authorize the agent to submit matters in dispute to arbitration, at least until after suit brought: *Further*, an authority to an agent stated thus, "if you can honorably and fairly settle with Reynolds out of court, do so, if not, let the court and jury settle," does not authorize a reference to arbitrators; nor will authority to exercise a reasonable discretion, or to submit to a reasonable sacrifice, confer such a power. See also Wallace v. The Br. Bank at Mobile, 1 Ala. Rep. 565; Hewes v. Doddridge, 1 Robinson's Rep. 143; Fisher v. Campbell, 9 Port. Rep. 210; Falls v. Gaither, Id. 605; Smith v. Gibson, 6 Blackf. Rep. 369.

Although the acts of an agent may be inoperative against his principal, yet it is competent for the latter to ratify them. The ratification of the act of one professing to act as agent, with knowledge of the facts, has the same effect as if the previous authority of the agent had been ample, especially in a case, where the person to be affected was not privy to the act of the supposed agent. Reynolds v. Dothard, et al. 11 Ala. Rep. 531. But where a third person acquires rights after the act is done, and before it has received the sanction of the principal, the ratification cannot operate retrospectively, so as to overreach and defeat those rights, and it has accordingly been held, that where one, acting as an agent of a third person, went beyond his authority in making an assignment of debts due his principal, and a creditor of the principal caused a garnishment to be served upon his debtor, whose estate was assigned, the subsequent ratification of the assignment by the principal could not defeat the lien of the garnishee. Wood v. McCain, *supra*, and citations in the opinion.

In determining the extent of the agent's power in the case before us, every thing that the principal said in respect to his conversation with the plaintiff, in which he avowed to him the intention to provide for the payment of the mortgage debt, by a transfer of half the negroes, embraced by the mortgage, to his, the mortgagee's son-in-law, and by an assignment of bank stock to the mortgagee, may be placed out of view. It cannot explain the written power previously given, nor even enlarge the interpretation of the subsequent verbal authority.

It is testified by the mortgagor that when he left Courtland, in December 1841, he had given no special authority to his agent to sell the slaves in question, but some years previously he gave his agent a general power of attorney, *to act for him in all cases whatever, and to do all which he himself might do;* that on parting with his son (who was the agent referred to) the mortgagor told him *to settle up all demands against the family before he should set off for Montgomery, and, acting under the power above referred to, to do all that might be neceseary.* The mortgagor deposed further, that *the slaves, Solomon and Hercules, were sold by his agent under a general power (verbally given) to discharge all demands against the family before he left Court-*

land for Montgomery. It was also proved that the mortgagor removed his slaves from Tennessee to Lawrence county, in this State in 1832; that he was about removing his family "back to Georgia," in the winter of 1841 & '42; that he had previous to his return to Georgia, a plantation in Alabama; that he had given no special authority to his agent to sell the slaves, Solomon and Hercules, previous to his departure from Alabama, but they were sold under the general power, verbally given, to discharge all demands against the family before he left Courtland for Montgomery.

The agent testified that he sold the slaves in question under a general power of attorney from the mortgagor to manage all his business in the State of Alabama. This power has been either lost or destroyed.

The terms, if such as the mortgagor supposes, would constitute a universal agent. Mr. Justice Story admits that such an agency may potentially exist, but adds that it must be of the rarest occurrence. Indeed, says he, it is difficult to conceive of its existence practically, inasmuch as it would be to make such an agent, the complete master, not merely *dux facti*, but *dominus rerum*, the complete disposer of all the rights and property of the principal. However this may be, we have seen that such an unlimited and unusual power will never be inferred from expressions, however broad, but will be restricted to the particular business in respect to which, it was intended to delegate the authority.

It must be admitted that the testimony is not as precise and definite as it could be desired, and as it doubtless would have been, if the witnesses had been more specially interrogated. But we gather from the evidence, that the mortgagor had a plantation in Lawrence county, on which the slaves in controversy were laborers and that the *general power of attorney* referred to his business in Alabama. In this view, although the authority may have been general, it must be restricted as to the field of its operation, and the manner in which it is to be exercised must be determined by the nature of the mortgagor's business. As it respects the present case, we shall consider the business to have been planting.

A general agency to manage, direct and superintend a plantation does not confer the power to sell the plantation,

or the slaves which are placed there to cultivate it, or otherwise assist in promoting its operations. If it were allowable to sell one acre under such authority, at what point would a limitation be fixed, and if one slave might be sold, upon the same principle, could not all of them be disposed of in like manner? We cannot perceive any middle ground, beyond which the agent shall not go, if the right to sell be conceded to him. Instead of conducting and managing the business for the interest of his principal, he might entirely arrest and destroy it; and this although the proceeds of the sale might be misapplied, and never received by the principal. It would certainly be competent for such an agent to employ and dismiss overseers, to sell the crops, to purchase necessary stock, &c., but he could not break up the business which it was the purpose of his agency to promote.

The power to *settle* all demands against the principal's family, before the agent left "Courtland for Montgomery," or even to *discharge* them would not we have seen authorize the agent to make a note, or submit to arbitration; and we think it cannot authorize him to sell the slaves of his principal, which were about to be removed from the plantation. The fact, that the money received by the agent for the slaves was appropriated to the payment of the debts of the principal can make no difference; certainly not, unless the principal was aware of such appropriation, and did not object, or assented to it, before the plaintiff's rights under the mortgage became known to the purchaser. Smith & Co. v. Zurcher, use, &c., 9 Ala. Rep. 208; Daniel v. Sorrells and another, Id. 436. After that time, the mortgage would become as operative against the purchaser, as if it had then been executed anew and recorded, but it could acquire no greater force. If, therefore, the mortgagor, upon being informed of it, approved and sanctioned the sale which his agent had made, previous to the defendant being informed of the existence of the mortgage, such a ratification would give to the defendant a title to the slaves, which would prevail against an unregistered mortgage of which he had no notice.

The fact that the mortgage was executed in Georgia, did not dispense with the necessity of registration, in order to make it valid as a security against creditors and purchasers,

if the possession did not vest in the mortgagee, or there was no actual notice of its existence, or any thing else which the law considers equivalent. The slaves were in this State, and this was quite sufficient to subject the mortgage to the influence of our registry laws, applicable to such a security. Adams v. Broughton, 13 Ala. Rep. 731, instead of opposing, rather favors the conclusion we have stated; though it must be conceded, the precise question did not there arise. See also Smith v. Zurcher, use, &c., 9 Ala. 208.

We cannot undertake to adjudicate the facts, and say that the ratification of the sale was made under such circumstances as to impart to it validity against the plaintiff. It is the appropriate office of the jury to scan the testimony, and to determine what part of it shall be credited, and what rejected; this duty cannot be assumed by the Judge. We cannot therefore say that the plaintiff has not been prejudiced by the refusal of the circuit court to give to the jury the instructions he prayed. They were suggested by the testimony—were pertinent, and, according to repeated decisions of this court, should have been given in the terms in which they were asked. If other instructions were necessary to have placed the cause upon its true grounds, the defendant could have then asked the court to give them. Whether any others were proper or could have availed, upon the proof set out in the bill of exceptions, we do not pretend to intimate. It follows that the judgment must be reversed, and the cause remanded.

RIDGELL *vs.* DALE.

1. R. and others execute a bond to D., conditioned to "forever indemnify and hold harmless the said D. from all loss and liability as a stockholder or officer of the Irwinton Bridge Company," of which D. was the President. D. sues R. on the bond, and assigns as a breach of its condition, that a suit was instituted against the company, to conduct which it became necessary to retain counsel, and that the plaintiff, being its President, and authorized by it to manage said suit, finding it impracticable to engage the services of counsel on the credit of the company, did so on his individual responsibility, and has been compelled to pay therefor a certain sum of money, which the company has

never refunded:—*Held*, that the assignment does not set out such a breach as entitles the plaintiff to recover, and that a demurrer to it should have been sustained.

2. A declaration in covenant must clearly show that the covenant is broken.

Error to the Circuit Court of Barbour. Tried before the Hon. George Goldthwaite.

Buford, for plaintiff:

1. The breach must be within the words of the covenant; it must appear from the declaration that the covenant was broken. Bearce v. Jackson, 4 Mass. Rep. 408; Twamly v. Henly, ib. 441; Prescott v. Truman, ib. 627; Richert v. Snider, 9 Wend. 416; Pollard v. Dwight, 4 Cranch, 421; 2 Bacon's Ab. (Am. ed. 1846,) p. 577, 578, 580, 582, 585.

2. Covenant must be construed as commonly understood. Pavey & Orr v. Burch, 3 Missouri, 447. In the case at bar the covenant may have been intended to embrace liabilities to the company for official default or misfeasance, and liabilities for contribution and levy as a stock-holder; or, (and past history however recent, is noticed by the court) if it is remembered how many companies and corporations without banking privileges assumed such privileges, and provoked the passage of the Act to make the officers and stock-holders personally liable, then the covenant may be understood as intended to cover such liabilities, which doubtless in this case was the fact, but by no construction can it embrace the case complained of.

3. Whether "the company" was a private or corporate association, is deemed immaterial, as the president of either is a mere servant and agent and not necessarily interested in or liable for its contracts.

Harris, contra.

DARGAN, J.—This was an action of debt on a bond, executed by the defendant below and others to the plaintiff, in the sum of six thousand dollars, bearing date the 14th day of May 1844, which was subject to a condition in the following words: Whereas, the said Robert O. Dale has executed to us his three several promissory notes, amounting in all to five thousand

dollars, one for sixteen hundred and sixty-six dollars and sixty-six cents, due six months after date, the others for the same amount, due at nine and twelve months, together with a mortgage of real estate with power of sale to secure their prompt payment: Now if we forever indemnify and hold harmless the said Dale from all loss and liability as a stockholder or officer of the Irwinton Bridge Company, this obligation to be void, but not else. The declaration contains five assignments of the breach of the condition of the bond, or rather the same breach is assigned five times in language slightly different, but in legal effect the same. The substance of the breach is that there was a suit pending in Randolph County, in the State of Georgia, against the Company, and the plaintiff, who was the President of the Company, together with the Secretary, were authorized to conduct and manage the suit. It became necessary to employ David Kiddoo as an attorney to take an appeal from the judgment of the Superior Court of Randolph, but he refused to be employed on the credit of the Company. The plaintiff and the Secretary had to become individually liable to pay his fee, and they executed to him their note for two hundred and fifty dollars, of which the Company was informed and they ratified the act. The plaintiff also avers that he has been compelled to pay the note, that the Company is insolvent and has not repaid him the sum paid the attorney—of all which the defendant had notice, &c. The defendant craved oyer of the bond and demurred to all the assignments; which was overruled by the court. The overruling of the demurrer is here assigned for error.

The only question raised by the demurrer is, whether the facts alleged constitute a breach of the condition of the bond. The intention of the obligors, as gathered from the language of the condition, is to indemnify and save the plaintiff harmless from all liability as a stock-holder and officer of the company; and consequently, extends to protect him from all liability, incurred in the performance of the duties required of him as president of the company, as well as all liability imposed on him by law as such stock-holder, or that it was his legal duty to assume. Was it his duty to become individually liable for the expenses or any part of them, incident to the defending of suits brought against the company? We are not informed

that it was, and we cannot infer in the absence of express allegations, that it is required of the President, as a part of his duty to become personally liable for the debts of the company, or to pay with his own funds, the necessary expenses of litigation. Indeed, we should be led to the opposite conclusion by the declaration. It alleges that the plaintiff was authorized to conduct the defence of the suit, and to pledge the property of the company, if it became necessary for that purpose; it then avers that counsel could not be employed on the credit of the company, and the plaintiff and the secretary, had to become individually liable for his fees, of which the company afterwards approved. This would rather incline us to believe that the plaintiff voluntarily assumed this liability for the benefit of the company, but not that he was bound to do it as president, or that it came within the range of his duties as president or stock-holder to pay from his own funds, the expenses of counsel fees.

A declaration in covenant must clearly show that the covenant is broken. 1 Hawks, 151; 3 Bibb, 330; 9 Wendell, 416. If the declaration is so uncertain that the court cannot pronounce that the covenant is broken, the plaintiff does not show that he is entitled to recover, and a demurrer should be sustained. Tested by these rules, the demurrer should have been sustained, for we are not able to pronounce that the condition of the bond is broken. Before it can be broken, the plaintiff must suffer loss in the performance of the duties required of him as President, or by the assumption of liabilities, that he was bound to assume. We are not informed that he was bound to assume this personal liability, and if he was not, the bond does not protect him, for it only extends to such acts as the President of the company, by virtue of his office, was bound to perform, and to such liabilities as it was his legal duty to assume.

The court erred in overruling the demurrer, and the judgment must be reversed, and the cause remanded.

STEWART *vs.* PRICE.

1. This Court has no power to revise the action of the Orphans' Court on the *annual* settlement of a guardian's accounts.

Error to the Orphans' Court of Montgomery.

WATTS & JACKSON, for plaintiff.

No counsel for the defendant.

DARGAN, J.—This was an application by the plaintiff in error to the Orphans' Court of Montgomery, to make an annual settlement of his accounts, as guardian of William H. Lewis, a minor. The plaintiff claimed, that his account should be credited with several items paid to the mother of the infant for board. The Orphans' Court refused to allow the credits, and to review this action of the court, this writ of error is sued out.

A writ of error lies only to a final sentence, judgment or decree. 3 Ala. 363. If it be not shown by the record that a final judgment has been rendered by the court below, we have no authority to review the errors that may be supposed to have been committed. True, it is made the duty of all guardians, once every year, or oftener if required, to render to the Orphans' Court, an account of the product of the estate of their wards, and of the sale and disbursement thereof—Clay's Digest, 267; but the rendition of this account, is not a final judgment or decree; the proceeding is *ex parte*, and no judgment is rendered on such account. On a final settlement, these annual, or partial settlements, made by an administrator or a guardian in conformity with law, must be considered as *prima facie* correct, but they are not conclusive. Willis v. Willis, 9 Ala. 330.

There being no final judgment, the writ of error must be dismissed.

CRAIG & WIFE *vs.* McGEHEE & ARMSTRONG.

1. The inventory returned to the court by an administrator is *prima facie* evidence against him, and, in the absence of other proof, is sufficient to charge him; but it is competent for him to show errors or mistakes in it, in order to relieve himself *pro tanto* from the charge.
2. Where on the final settlement of an estate, it is shown that a slave included in the inventory was purchased by the administratrix after the death of her intestate, and paid for with $375 of her individual funds, and $62.50 of the funds of the estate, and that in the accounts rendered she had debited herself with the latter amount and interest thereon, it is not error in the Orphans' Court to refuse to regard said slave as assets of the estate, or to charge the administratrix with its value.
3. Where an administratrix, duly authorized by the court to keep together the personal estate of her intestate for the term of ten years, unites her own labor, and that of a slave, belonging to her, with the labor of the slaves of the estate,—charges herself with the entire proceeds of the crops,—and, by her prudence and diligence, so manages the trust as to advance the interest of the beneficiaries,—she is entitled, on final settlement, to a fair compensation for the services of herself and slave.
4. An administratrix, who has managed the estate with prudence and in good faith, and who has been guilty of no default in settling, when required to do so, does not forfeit her right to compensation, by her omission to make *annual* returns.
5. It is error to decree a sale of the lands of a decedent on the petition of the personal representative, without the previous appointment of a guardian *ad litem* for the infant heirs.

Error to the Orphans' Court of Dallas County. Tried before the Hon. A. J. Saffold, Judge.

Evans, for the plaintiffs in error:

1. The administrators should, under the circumstances, stated in the bill of exceptions, have charged the administrators with the value of the slave Mary. The inventory is *prima facie* evidence to charge them. Steele v. Knox, 10 Ala. 609.

The administrators, neither by virtue of their general authority as administrators, nor under the act of 1835, have any right to place their slaves on the plantation and charge

the estate with the hire of such slaves. The act referred to, confers on them, no authority to hire slaves, much less to charge the estate for the hire of their own slaves, thus placing the *interest* of the administrators in direct conflict with their *duty*. Willis' adm'rs v. Willis' heirs, 9 Ala. 333.

3. Under no circumstances, could the amount allowed, exceed the *actual benefit* derived by the estate from the services of the slaves, but this principle in the court below, is altogether disregarded, and hire allowed without any proof. Sumner, adm'r v. Williams, 8 Mass. Rep's. 199; Savage v. Benham, 11 Ala. 49; Harris v. Martin, 9 Ala. 895.

4. The allowance for land rent is even more objectionable. The administrators will not be permitted to buy lands with the assets of the estate, and charge the estate with rent. The objections to this item are not removed by the statement in the bill of exceptions, that the allowance is in part, for compensation to the administrator for services. This the law presumes was considered and allowed on the annual settlements, and if not, it is improper so to blend several items of account: as an allowance to administrators it is exhorbitant, and if (as the bill of exceptions shews was the case) any part of it is for the rent, it is illegal.

5. The record shews that some of the distributees are minors, and it is erroneous to pass on their rights without the protection of a *guardian ad litem*. Taylor v. Reese, 4 Ala. 121.

6. An administrator who is authorized to reserve property from sale for ten years, &c., is required to make annual settlements and if he fails to do so, he is not allowed compensation for services. Clay's Dig. p. 198, § 31–32–33; Benson v. Bruce, 4 Dess. Rep. 463; Wright v. Wright. 2 McCord's Ch. Rep. 8; Jenkins v. Fickling, 4 Dess. 369; Frazier v. Vant, 1 Hill's Ch. Rep. 210.

Hunter & Bird, for the defendants:

1. The inventory is only *prima facie* evidence against the administrators. 2 Greenl. on Ev. 277, § 347; 2 Williams on Ex'rs, 648; Brazil v. Brazil, 9 A. R. 491; Steele v. Knox, 10 A. R. 608. The proof showed that Mrs. McGee, (administratrix) after the death of her husband, purchased and paid for the slave Mary, with her own money, thus fully rebutting the

prima facie intendment of the inventory, and showing that the insertion of this slave's name was by accident or mistake.

2. Mrs. McGee is charged in the account current, with the crops which this slave of her's assisted in making, by working on the plantation in common with the slaves of the estate. To this extent the labor of her slave was made to increase the estate and funds with which she was charged; some allowance therefore, for the labor of this slave was certainly proper.

3. The allowance of six hundred dollars to Mrs. McGee, for the whole time she acted as administratrix, considering the labor and extraordinary services performed by her, was certainly very low. She was acting about twelve years, and the allowance of six hundred dollars, was for the whole time, being about $50 a year, without any interest. Besides, this $600, also included the rent of her land. No question is made by the bill of exceptions as to the propriety of Mrs. McGee having used funds of the estate for the purchase of the land; the administrators in their account current, being charged with the money so used, and interest thereon. The amount of compensation is to be regulated by the circumstances of each case. Phillips v. Thompson, 9 Porter 664. It will be observed that there was in fact, no renting or hiring, although it is so called in the bill of exceptions. The produce of the administratrix's land, and of the labor of her slave, had innocently become intermixed with the estate's funds, and she had charged herself with her own money—and all the court did, was to seperate her own funds, with which she was charged, from the real fund, belonging to the estate. This could as well be done by charging her with the whole amount, and then crediting her with what was her own, as by merely charging her in the first instance, with the actual amount as belonging to the estate. It is a mere difference of methods, the result being precisely the same by each process. Powell v. Powell, 10 Ala.

4. As to the objection that no guardian, *ad litem*, was appointed, it is contended that it does not appear that there were any infants; on the contrary, we must intend from the record, that all the parties were of age. This objection for want of proper parties, made for the first time in this court, is of course, not favored; all legal intendments, are to be made in favor of

the decrees, and the matter alleged as error, must clearly and affirmatively appear. These rules all apply with full force, here, and even if it were doubtful whether there were not infants, would be sufficient to sustain the decrees.

CHILTON, J.—On the 18th September 1835, the defendants in error, applied for, and obtained letters of administration upon the estate of Joseph McGehee, late of Dallas county, deceased. The letters were granted by the Judge of the Orphans' Court of Dallas county, under the first section of the Act of 1835, authorizing the personal estate of the intestate, to be kept together, and exempt from sale, for ten years, and bond was executed accordingly by said representatives. Dig. 198, § 30.

In December 1835, James H. Armstrong, one of the representatives aforesaid, returned to the Orphan's Court of Dallas, an inventory of said estate, duly verified by his oath, and which embraced a certain negro girl, named Mary, who was by the appraisers estimated to be worth $450.

In May 1836, an annual settlement was made by said Armstrong with the court, and no further proceeding appears of record in the matter of said estate, until the January Term, 1846, when an order was granted, to sell all the personal estate, and a petition was filed to sell 80 acres of land, for the purpose of making more equitable distribution among the heirs.

Upon the final settlement, which took place in May 1847, the defendants in error were permitted to strike from the inventory, the name of the negro girl, Mary. The evidence adduced in support of the motion to amend the inventory, by striking out the name of said slave, was a bill of sale for her, from one D. G. Brandon to Elizabeth McGehee, the administratrix, and that Mrs. McGehee claimed the girl under her purchase, after said appraisement and inventory were returned to the Orphans' Court. It was also shown that she did buy and pay for said negro girl as set forth in the bill of sale, paying of her own funds the sum of $375,00, and of the money belonging to the estate of her intestate, the sum of $62.50, with which last named sum she was charged in the settlement, together with interest from the time of investment. The $375

was raised by said Elizabeth, from the sale of her interest in her father's estate, which interest had not been reduced into possession by the said Joseph McGehee, in his life time. The purchase was made some ten months after the death of the intestate. The Orphans' Court, under these facts, refused to charge the administrators with the price of the slave, or to consider, as assets in their hands, the $375, used in her purchase, but allowed the administrators $300 for the reasonable hire of said girl, while she labored for the benefit of the estate.

1. It is insisted on the part of the plaintiffs in error, that under the circumstances shown in evidence, the court should have charged the administrators with the value of Mary: that the inventory is *prima facie* evidence of the said slave being a portion of the assets of said estate.

There can be no question that the inventory sworn to by the administrator, is sufficient, in the absence of proof, showing a mistake, to charge the party exhibiting it, with the property so returned, as assets of the estate. In Steele v. Knox, 10 Ala. Rep. 615, it is said, "the inventory of the estate, which the personal representative is required to make, would certainly be evidence against him in the absence of all other proof of the value of the property." See also, Brazeal's adm'r v. Brazeal's distributees, 9 Ala. Rep. 461. This position is not gainsayed by the defendant's counsel, but they insist that this *prima facie* intendment is sufficiently rebutted by the proof shown in the record.

We think the proof set out in the bill of exceptions sufficently shows that the girl, Mary, was improperly returned in the inventory. The interest of Mrs. McGehee in the estate of her deceased father, which her husband had never reduced to possession, was, after his death, her individual property, and she was not chargeable with the sum for which she sold it, as assets of the estate. Terrell, et al. v. Greene, et al. 11 Ala. Rep. 207; Johnson, adm'r v. Wren, 3 Stew. Rep. 172; Mayfield v. Clifton, ib. 375. True, the sum of sixty-two 50-100 dollars of the money belonging to the estate, was advanced in the purchase of the said girl, and the rule is well settled, that a trustee, shall not be allowed to profit by speculating on the trust fund, and if any profit accrues, the same belongs, at

his election, to the *cestui que trust;* this sum, however, with interest from the time of such investment, is charged to the administrators, and no question was raised in the court below as to any supposed profits which accrued upon the investment. The questions there made, and which are here presented for our revision, are, should the administrators be charged with the value of the slave, and with the $375 paid for her? There is no pretence that the administratrix was guilty of any fraud, or bad faith, in making the investment, and as the $375 belonged to her, the court very properly, in our judgment, refused to charge her with the value of the slave, Mary, or to regard her as assets of the estate. There was then no error in allowing the mistake in the inventory to be corrected on the final settlement.

2. Did the court err in allowing hire for the slave Mary? It is shown she labored upon the premises where the farming was carried on some eight or ten years. The crops, which are the joint product of the labor of the administratrix and said girl and two slaves belonging to the estate, are charged to the account of the administrators in the final settlement.—Being charged with the produce of the slave's labor, it is certainly just that she should be allowed a reasonable compensation for her service, unless there is some rigid rule of law which forbids it. The act of 1835, which authorizes the Judges of the several County Courts, upon good cause shown, to permit the executor or administrator to keep the personal estate of the decedent together for any term not exceeding ten years, contemplates that the personal representative should manage the property so as to make it most available to the estate. He is required to keep, and annually to return an account of the manner in which the estate has been managed, the crops made, the expenses incurred, and the disposition of all monies received from the estate. And by the act of 1839, the administrator or executor is authorized to retain the real estate in cases where he keeps the personal property together for ten years, and to cultivate such real estate, &c. See Dig. 198, §§ 30, 31—page 199, § 37. To carry out the object of the Legislature, it is manifest, a reasonable discretion must be vested in the personal representative, in order to render effectual the powers confided to him. It may become one of the

last importance, in the varied operations of agriculture, for the administrator to incur expense in employing assistance to pitch, cultivate or garner the crops, to purchase implements of husbandry and the like, or to rent land so as to render the labor of the hands most profitable. Were such powers denied him, it would often happen that the cultivation of the real estate could not be successfully carried on, and a loss instead of a profit might result to the estate. It must be made to appear, however, that the acts of the representative, involving the exercise of such power, were for the benefit of the estate, and not for the purpose of profit to themselves.

The case at bar furnishes, we think, a fit illustration of the policy of the Legislature in the enactment of the statute above referred to, and of the powers which may properly be exercised by the administrator. The decedent left a small estate, and a wife and eight daughters, who must support upon it. The estate, if sold, would doubtless have been wholly inadequate to their maintenance, and the widow is permitted to keep it together. The estate owning only a negro man and woman, the administratrix, by the use of a small part of the means of the estate, coupled with what she possessed individually, purchased a small tract of land and a negro slave, charging herself, however, with the funds of the estate so invested, and interest from the time of such investment. With these small means, by the personal supervision and labor of the widow, (for the proof shows she worked in the cotton-field with the hands daily, during the cotton season, for eleven years,) she is not only enabled to support her family, but produces cotton crops, the net sales of which, with interest, amount to some $5,000, with all of which she is charged.—Besides this, the increase of the female slave, in the mean time, adds to the value of the estate.

This result of the management of the estate vindicates the wisdom of the enactment, and shows too that the administratrix has used extraordinary efforts to render the assets available. No part of the record shows that she was at any time wanting in good faith, in the discharge of the trust committed to her. Her own personal services, the labor of her slave and the rent of the land, all go to swell the assets of the estate, which are charged to her; and having acted in good faith, in

thus commingling her own with the assets of the estate, we think the court acted very correctly in making her a reasonable allowance for the hire of her slave and her own services. The rule as to compensation is very correctly, we think, laid down in the case of Harris v. Martin, 9 Ala. Rep. 900: If such services were necessarily and *bona fide* rendered, or were required by the exigencies of the estate to be rendered, and were for its benefit, the court should make such an allowance as, under all the circumstances, would be reasonable and just. The court, in such cases, will nevertheless closely scrutinize the acts of the trustees, to see that their duties, if brought in conflict with their interest, have been strictly and in good faith performed. See, also, Savage v. Benham, adm'r., 11 Ala. 49.

We think the objection, that it does not affirmatively appear from the record in this case, that the services of the slave as well as of the administratrix were required by the exigencies, and did not, after the compensation was deducted, redound to the benefit of the estate, is not supported by the record. It is clearly inferrable from the proof, that laying out of view the rent of the land, for which nothing seems to have been allowed, the compensation is but a very moderate allowance, and that the interest of the distributees has been advanced by the employment of the labor for which the allowance was made.

3. Does the failure of the administratrix to make annual returns deprive her of the right to compensation? The decisions to which we have been referred, from South Carolina, do indeed hold the affirmative of this proposition; but it will be found that they rest upon a statute of that State, passed in 1789, by which commissions are to be disallowed when annual returns have not been made—3 Eq. Rep. 78. Our statute is merely directory, and although it would be entirely proper to refuse compensation in cases where the administrator refuses to account, or stands out in contempt of the authority of the court, as in the case of Hall v. The Heirs of Wilson, 14 Ala. Rep. 295, yet where the party is guilty of no default in settling when required, and has exercised that diligence in respect to the proper management of the estate which prudence and good faith demand, he should be allowed a just compensation. In Bryant v. Craig, 12 Ala. Rep. 354, which

was an attempt to charge a guardian with compound interest, because he had failed to make annual returns, it was held, that the mere omission of the guardian to make annual settlements was not evidence of fraud, so as to charge him with compound interest. The statute requires guardians as well as administrators, under the act of 1835, to render annual accounts. Dig. 270, § 15. Compensation should only be refused in cases of wilful default, or gross negligence, causing loss to the estate. Powell v. Powell, 10 Ala. Rep. 900.

4. It however appears from the petition filed by the representatives, for leave to sell the real estate, in said Orphans' Court at the January Term 1846, that two of the children of the intestate, viz, Margaret and Amanda, were infants under the age of 21 years. Application for final settlement was made in January 1847, but the settlement was postponed until the May following. By the third section of the act of 1843, (Dig. 229, § 43,) the administrator is required to file with his vouchers, &c. for final or annual settlement, a statement under oath, containing a list of the heirs and legatees of the estate, specifying which are minors, &c., so that the Orphans' Court may be able to appoint guardians *ad litem* for the infants, and make the proper decree of distribution. This the administrators failed to do, and no guardian *ad litem* was appointed for either of said minors. The record, we think, sufficiently shows that two of the distributees are infants, and the statute requires that they should have guardians *ad litem* to represent them.—Taylor & Wife v. Reese, adm'r., 4 Ala. Rep. 121. We are compelled, therefore, though we confess reluctantly, to reverse the decree and remand the cause. See Parks v. Stonum, 8 Ala. Rep. 755; Roberts v. Stanton, 2 Munf. 129.

Reversed and remanded.

ROBINSON *vs.* CRAIG.

1. In an action for a tort to to the person, the plaintiff is not entitled to a discovery from the defendant in aid of his action.
2. A writ of error will not lie to revise the action of an inferior court, on an application for the allowance of interrogatories under the statute to a party in the suit.

Error to the Circuit Court of Limestone. Tried before the Hon. Thomas A. Walker.

The plaintiff instituted his action against the defendant in error for seducing, debauching, &c., the wife of the plaintiff, and made application to the court for the allowance of interrogatories under the statute to the defendant, in aid of his action. The court refused the application, and to revise this action of the court, the writ of error in this case is sued out.

L. P. Walker, for plaintiff in error:

1. The *facts* sought to be elicited from Craig by the interrogatories, are not such as he would be privileged from disclosing upon a bill of discovery in chancery.—In chancery the defendant is not privileged from making the discovery sought, unless it would subject him to a criminal prosecution, to penalties, or to a forfeiture, or something in the nature of a forfeiture. 2 Paige R. 601; 1 Peters, 100, 138, 232; 2 Vesey, 245; Story Eq. Pl. (3d edit.) § 824, § 575–6, § 521–2–3–4; Hare on Discovery, 131–156; Wigram Discov. p. 28–9 (Law Library edition). As to what are *penalties* and *forfeitures* as here alluded to, see Story's Eq. Pl. (3d edit.) § 579–80, *et seq.*

2. A bill of discovery lies as well in aid of an action for a *tort*, as of an action upon a *contract*. It is only where the *tort* amounts to an *indictable offence*, or subjects the party to *penal consequences*, that discovery is refused. All the cases in 5 Maddox Rep. 218; 2 Sim. & Stu. 79; 2 Russell Rep. 550; 4 Sim. 263; 1 Keen, 329; are decided upon this principle. See particularly, 3d edit. Story's Eq. Pl. § 553, note (3); ibid, § 597, note 3 and 4; 9 Paige, 580.

L. Parsons, for defendant:

1. A party is not bound to discover what may even tend

to criminate him, nor to disclose one fact which, with others, might have that effect. Story's Eq. Plead. § 524, (3d edit.) 579.

2. This is an action *ex delicto*, in the nature of a personal tort. There is no case in which the plaintiff, in such action, ever maintained a bill of discovery. This was said by the counsel on both sides and by the court in Glynn v. Houston, 1 Keene, 329.

3. The above suggestions and authorities take this case entirely out of those decisions which have recently gone most unjustifiable lengths, as I think, in allowing discovery in cases of even crime, when the danger of indictment is at an end. The danger of perjury appears to have been lost sight of. But if it were necessary, I would contend that this case, independently of the matters suggested above, is not within those authorities. They must have some limit.

DARGAN, J.—I have sought in vain to find a precedent where a bill of discovery has been brought in aid of an action at law, to recover damages for a tort done to the person of the plaintiff. In the case of Glynn v. Houston, 1 Keene, 329, it is said, both by the counsel in argument and the court in delivering judgment, that no such case could be found. This, to my mind is conclusive, that a plaintiff who has sued for a tort done to his person, cannot file a bill of discovery to compel the defendant to confess the commission of the tort.

2. But we think it settled by a previous decision of this court, that a writ of error will not lie to review the action of an inferior court, refusing to grant an order requiring a party, to whom interrogatories have been propounded, to answer them under oath. In the case of Mallory v. Matlock, 7 Ala. 757, it is said, "the refusal of the court to grant an order, requiring the defendant to answer the interrogatories propounded to him, is not a matter that can be reviewed by writ of error." It is not a final sentence, judgment or decree, but is merely an interlocutory order, and does not necessarily enter into the final judgment. If the court should refuse to grant the order, when a proper application is made to it, this error may be corrected by mandamus during the pendency of the suit: But it cannot be reviewed by writ of error, nor can the plaintiff in error,

by taking a non-suit because of the refusal of the court to make the order, bring the case before this court by this writ.

The judgment must be affirmed.

NOLAND ET AL. *vs.* LOCK.

1. The Orphans' Court has not the power to vacate a judgment for costs as to one party, and adjudge them against the other, at a term of the court subsequent to that at which the judgment was rendered.

Error to the Orphans' Court of Pickens. Tried before the Hon. Lemuel A. Gilkey, Judge.

On the 19th November 1846, the defendant in error contested the will of Philip Noland, deceased, and having failed, judgment was rendered against him in favor of the plaintiffs in error, the executors, for the costs of the proceeding. On the second Monday in May 1848, the defendant in error moved the court "to re-tax the cost in the matter of the probate of Philip Noland's Will, heretofore taxed against him as contestant, so as to tax said cost against the executors of the estate," &c. The court granted the motion, and ordered "that the costs, heretofore adjudged against said Locke, be taxed against the estate of Philip Noland, and paid by the executors." To this the executors excepted, and now assign it as error.

J. L. Martin, for plaintiff in error.

Peck, for defendant:

1. The Orphans' Court may set aside a probate of a will previously granted, and consequently it may set aside the order for costs—the greater certainty includes the lesser. 6 N. S. 166.

2. The Orphans' Court is sub modo a court of equity, and necessarily exercises a discretion as to costs.

3. A motion to re-tax costs, may be made at a subsequent Term. 3 Porter, 335.

4. On this subject see 11 N. S. 12; 12 do. 473; 5 do. 517; 8 do. 79; 11 do. 615.

5. A decree for costs merely, will not be reversed.

DARGAN, J.—In support of the judgment of the Orphans' Court, it is contended, that this was a mere motion to re-tax the cost, and not a motion to set aside a judgment rendered at a previous Term. A motion to re-tax the cost of a suit is simply a motion to correct a ministerial act of the clerk, or officer whose duty it is to tax the cost; but here the defendant in error did not move to have any mistake of the clerk corrected in taxing the cost, but by his motion, he asked the court to alter the judgment for cost and to render judgment against the other party; in one word, he asked the court to release him from the cost altogether, although judgment for cost had been rendered against him, and to impose it on his adversary. Instead of being a motion to re-tax cost for a mistake of the clerk, it clearly is a motion to alter the final judgment, that had been rendered at a previous Term, which cannot be done.

The court erred in granting the motion, and the judgment must be reversed.

KENAN *vs.* HOLLOWAY.

1. A voluntary payment of money by one person for the use of another, without a previous request, will not support a subsequent promise to refund, unless the payment is beneficial to the promissor.
2. The satisfaction of a judgment by a third person, if sanctioned and adopted by the defendant, will ordinarily support a promise to refund. In such case, the fact of ratification warrants the implication of a previous request.
3. An acknowledgment by K. to a stranger, that she owes H., for money which he had voluntarily paid for her, without a previous request, and that she is in honor bound to reimburse him, and intends to do so, is not a promise to H. to refund him the money so paid.
4. A promise, made under such circumstances as show an ignorance, on the part of the promissor, that the demand, promised to be paid, creates no legal liability, is without consideration and void.

5. If a party offers in evidence an *entire* record, a part of which is legal, and a part illegal testimony, the court commits no error in excluding the whole.
6. Where the *mere tendency* of a charge is to mislead the jury, the party, to be prejudiced by it, should ask additional and explanatory instructions; but where its *necessary effect* is to produce that result, the charge is fatally erroneous.

Error to the Circuit Court of Wilcox. Tried before the Hon. Nathan Cook.

This was an action of assumpsit, by the defendant against the plaintiff in error, for money lent and advanced. The following facts appear from a bill of exceptions found in the record. One Seawell obtained a judgment in the County Court of Mobile, against the defendant and Thomas Kenan, as executrix and executor of Michael Kenan, deceased: an execution issued on this judgment, and was levied, and bond was taken for the delivery of the property from the executrix and executor, which was forfeited, and thereupon an execution issued against them and their securities, which on the 7th of March 1842, came to the hands of the plaintiff as sheriff of Dallas county, and was by him satisfied by a payment to the plaintiff therein, on the 28th April 1842. The plaintiff proved by one Philpot, that in a conversation with him, the defendant stated, that she had promised the plaintiff to have the money to satisfy the execution at Cahawba, on the first day of the Spring court, and would have had it there at the time, had she not been advised by an attorney in Mobile, where she went to raise the money, that she could be relieved from the judgment: that on her arrival at Cahawba, on the first day of court, she learned, that the plaintiff had advanced the money out of his own funds: that he should not lose it, having paid it innocently: that she was in honor bound to reimburse him, and intended doing so, though she regretted, that he did not await her return from Mobile, before he paid it. The same witness stated, that in another conversation with her, she said, in reference to a sale of her plantation in Dallas, to one Wilson, that if Wilson bought it, he must satisfy the plaintiff's claim for the money advanced by him on the execution, as she owed it. The defendant offered in evidence the transcript of a bill filed by her and Thomas Kenan,

against Seawell, on the 30th April 1842, to restrain and perpetually enjoin the collection of said judgment, with the proceedings, and final decree thereon in accordance with its prayer. To the introduction of this transcript, the plaintiff objected, and the court excluded it from the jury. Various charges were asked by the defendant and refused, and others were given by the court, but the following charge is the only one necessary to be stated: The court charged the jury, that although the plaintiff may have paid the money on the execution voluntarily, and without any previous request from the defendant, yet if they believed, from the evidence, that the defendant, after the payment of the money, assented to the payment so made, and in consideration thereof, promised the plaintiff to refund it to him, that the defendant would be bound by that promise, and the plaintiff would be entitled to recover.

To the ruling of the court and to the several charges given and to the refusal to charge as requested, the defendant excepted, and now assigns them as error.

Boling & Saffold, for plaintiff in error:

1. There was no *new consideration.* So far as the proof shows Holloway paid the debt *voluntarily.* Mrs. Kenan would not have been liable had she given her note for the debt. Hester v. Weston, 6 Ala. Rep. 416; Ten Eyck, et al. v. Vanderpool, 8 J. R. 120; Rhan v. Hughes, 7 Term Rep. 350, Note; Brown v. Adams, 1 Stew. Rep. 51; Click v. McAfee, 7 Porter, 62.

2. The promise must have been *beneficial* to her to bind her. Brown v. Barnes, 6 Ala. Rep. 694; Nelson v. Boynton, 3 Metc. 396. In the latter case, an attachment was dismissed on promise of a third party to pay the money. The third party was not held liable because the promise was not *beneficial to defendant.*

3. Mrs. Kenan's ackowledgment that she was bound, if made under a mistake of the law, does not create an obligation on her, if the law itself would not impose one. Warder and others v. Tuck, 7 Mass. Rep. 449; Freeman and others v. Boyington, 7 Mass. Rep. 483.

4. The record from the chancery court should have been received. It was proper evidence. It was good to show a

want of consideration—also, to show that no detriment could have resulted to Holloway, had he failed to pay over the money, or had he failed to make it. McCall v. McRea, 10 Ala. Rep. 313. It could have been introduced to show the fact of suit and *perpetual injunction.* 4 Phil. Ev. by C. & H. 815, Note, 567; ib. 817, note, 270, 583, p. 333. The record is good evidence to show that she was *actually damaged* by his paying the money at the time he did, *voluntarily,* and *without* any *request.* Moreover, the reason is given by her for wishing to pay Holloway; not on the ground that she was benefitted, but because he was the *innocent party,* and ought not to lose it. The *supposed cases* of the counsel for defendant in error, of benfit to her, cannot answer here, as that she was *relieved* by his paying the money from giving an injunction bond, &c. She got into worse hands by becoming liable to Holloway.

5. Mrs. Kenan has been damaged by the charge of the court *presupposing,* that there was a promise. There was nothing to found the *charge upon.* It necessarily had a bad effect upon the jury, for the court to throw out any such intimation to the jury. The whole testimony is set out, and no promise is shown whatever: It is not shown that she ever saw Holloway, or said one word to him about the case; the court therefore erred in making this charge.

6. It distinctly appears, from the only testimony in the case, viz, Philpot's testimony, that Mrs. Kenan never did promise Holloway, to pay him; and what she said to Philpot, was after she had obtained the injunction.

Lapsley & Hunter, for defendant:

1. As to the matter of consideration. To support an express subsequent promise if there is a benefit to the promissor, no express previous request is necessary. The doctrine of a past or executed consideration never applies, except where there is no benefit to the promissor. Story on Contracts, p. 94–95 and 96, §§ 147, 148 and 149: See especially, § 147 and 149. This is the language: "and, generally, where a party derives a benefit from the consideration, a request will be inferred," and note 4 to this sentence, where many authorities are cited. See also, 4 Am. Jurist, 2, for Mr. Metcalf's article. But the case of Rountree v. Holloway, 13 Ala. Rep., is directly in point.

But it is contended that there was *no debt* due at the time Holloway paid the money. The answer to this is: it is wholly immaterial as between Holloway and Kenan, whether there was a debt as between Kenan and Seawell—there was a judgment in full force, and an execution out against her, and Holloway's relieving her from the pressure of such judgment and execution, was a sufficient consideration, even if it had been proved by competent evidence, beyond all question, that no debt was due, as between Kenan and Seawell. See as to consideration, Story on Contracts, 73, § 115. But this qustion *is not raised upon the record. There was no evidence showing, or tending to show, that there was no debt due, and no charge asked or refused on that question.* This concludes the matter without any question. It is certain that the decree rendered three years after, when Holloway was no longer a party, was not evidence for that or any other purpose. Holloway had ceased to be a party before that decree was rendered. As to this record, it will be observed, that the *whole* record was offered and rejected—it contains the decree perpetually enjoining the judgment, *which was rendered after Holloway had been dismissed as a party.* This decree was clearly not evidence against Holloway, and for that reason the whole was properly rejected. The court was not bound to distinguish for the party offering, the good from the bad. Hrabowski v. Herbert, Daniel & Co. 4 Ala. 265.

2. As to the charge asked about reviving a consideration, where it was *suspended* by statute, &c., that charge was clearly abstract. It will be found on examining the authorities, that it is under the head of *statute of limitations.* There was no evidence of any old right of action which had been lost by delay, but the evidence was of an *entirely new, original cause* of action just then *arising.* This charge if given, could only have misled the jury, by putting before them a legal truism, wholly inapplicable to the facts of this case.

COLLIER, C. J.—It is well settled that money paid by one person for the use of another does not necessarily impose a liability upon the latter; for one man cannot of his own will pay another man's debt without his consent, and thereby convert himself into a creditor. Durnford v. Messiter, 5 Maule &

S. Rep. 445; Weakley v. Brahan & Atwood, 2 Stew. Rep. 500. In such case then, the payment does not create a consideration from which the law will imply a promise to repay, but to entitle the party to recover, there must be a previous request, not only alleged, but actually proved. Kaye v. Dutton, 7 Mann. & Grang. Rep. 807; Victors v. Davis, 12 Mees. & Welsb. Rep. 758. Where, however, the consideration is beneficial to the party sought to be charged, and is actually adopted or taken advantage of by him, the person executing the consideration becomes the agent of the promissor, by the adoption of his act by the latter. *Omnis ratihabitio retrohabitur et mandato equiparatur.* Story on Con. (2d edit.) § 473, and citations in Note 2; Rountree v. Holloway, 13 Ala. Rep. 357.

It is said to be of the essence of every consideration, that it should create some benefit to the party promising, or some trouble, prejudice or inconvenience to the party to whom the promise is made. Story on Con. (2d edit.) § 431, *et seq.* But an executed consideration which was not induced by a previous request of the promissor, if not beneficial to him, will not sustain the promise upon the ground that it was an injury to the promissee. Am. Jur. Oct. 1839, p. 2.

A moral obligation it is is said, is not a sufficient legal consideration to support either an express or implied promise, for the law cannot undertake to enforce every promise which a man of honor and integrity would feel himself bound to perform. In Smith v. Ware, 13 Johns. Rep. 259, a deed of land described it as "supposed to contain ninety-three acres," but upon admeasurement, it was ascertained to contain much less, and the vendor promised to return a proportional part of the price: *Held*, that as the terms of the contract indicated a willingness by both parties to take the risk of any mistake in quantity, the promise was a mere *nudum pactum.* So in Mills v. Wyman, 3 Pick. Rep. 207, it was held, that the general rule, that a moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases, where a good or valuable consideration once existed. Accordingly, where a son, who was of full age, had ceased to be a member of his father's family, was suddenly taken sick among strangers, and, being poor and distressed, was reliev-

ed by the plaintiff, to whom the father afterwards wrote, and promised to pay the expenses incurred, it was decided, that such a promise would not sustain an action. It was admitted by the court, that some of the authorities lay down the rule in general terms, that a moral obligation is sufficient to support an express promise; but it was said, that an examination of the cases shows, "that the universality of the rule cannot be supported, and that there must be some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise: *Further*, "a deliberate promise in writing, made freely and without any mistake—one which may lead the party, to whom it is made, into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party, making the promise, gains something, or he, to whom it is made, loses something, that the law gives the promise validity." See Story on Con. (2d edit.) § 465, and citations in note 3; Am. Jur., July 1839, p. 276; 2 Greenl. on Ev. § 107, and note, 2, *et seq.*.

Prima facie, (it may be conceded,) the payment of the execution, to the plaintiff therein, was beneficial to the defendant, if the forthcoming bond imposed a personal liability upon her; but whether such was the effect of the bond, is a question, which the view we take of this case makes it unnecessary to decide. See Betts adm'r v. Taylor, 8 Port. Rep. 564. Upon the assumption that the payment was a benefit to the defendant, it would furnish a sufficient consideration for an express promise by her to reimburse the plaintiff. If, however, the judgment on which the original execution issued, could not be enforced, and has been perpetually enjoined, she could not have been benefitted by its payment. The payment did not create a moral obligation upon her to reimburse, and a promise to do so would be a mere *nudum pactum*. If the plaintiff satisfied the execution *gratuitously*, we have seen that the defendant would not become his debtor, and even an express promise subsequently made, would not make her so, unless she derived a benefit from the payment. A discharge from liability to satisfy a judgment, under ordinary circum-

stances, if sanctioned and adopted by the defendant, would sustain a promise, as we have already seen. The fact of ratification would warrant the implication of a previous request.

The facts deposed to by the witness, Philpot, we incline to think, do not establish an express promise. Giving to the language of the witness the most liberal construction of which it is susceptible, and it merely shows that the defendant was unwilling that the plaintiff should be a sufferer by the payment of the execution. She doubtless was under the impression, that he supposed, from the intention she had avowed previous to her departure for Mobile, that she proposed to obtain the money there, and satisfy the execution on the first day of the court, to which it was returnable, and that in paying it previous to that time, he really intended to confer a favor on her. While she regretted that he had made the advance for her, because she had changed her purpose in Mobile, and while there obtained an injunction, which she was advised would be perpetuated, under a sense of gratitude for an act of intended kindness, she declared to the witness, that the plaintiff should be reimbursed, and that she desired to sell property to obtain the money. The conversations with the witness do not appear to have been communicated to the plaintiff, and if they were, it is wholly immaterial, for we have seen they could not inure as a promise to the plaintiff, but were nothing more than a declaration of her intention, made to the witness alone. The plaintiff cannot avail himself of them as an admission by the defendant, because they related to a consideration, if indeed it be one, that was *executed* and *passed*, and consequently could not have influenced him in what he did. 2 Starkie Ev. 31, 1st Am. edit. Conceding that the declaration, that *she owed* the defendant, could be construed into an acknowledgment of indebtedness, yet it does not constitute a direct promise; and if it did, it is said to be well settled that a promise under such circumstances as show an ignorance that the party was legally discharged, is without consideration and void. Warder, et al. v. Tucker, 7 Mass. Rep. 449; Freeman v. Boynton, Id. 483; Kennon v. McRea, 7 Port. Rep. 175.

If a subsequent promise was made to pay the plaintiff, it then might have been material to show that there was no consideration to support it; as, that the judgment was enjoined

previous to such promise, and that the injunction was subsequently perpetuated, so that the defendant derived no benefit from the payment. In this point of view, it was important to adduce the record of the chancery suit and decree at Mobile. Now, although that suit may have been dismissed as to the plaintiff, previous to the rendition of the decree, yet the record was admissible to show the time when the injunction was obtained, and to identify the judgment at law; and the decree was proper evidence to show that that judgment was enjoined and could not have been enforced against the defendant. In such case the record and decree are competent evidence of the facts we have stated. 1 Starkie Ev. 187, *et seq.* 1st Am. edit. Id. 286. But the record was not admissible for all purposes, especially as to the facts alleged in the bill. The defendant then should have avowed the facts, proposed to be proved by the record, and not having done so, the court was not bound to discriminate between the parts, which were admissible and incompetent, but might reject it *in toto.*

The legal questions naturally suggested by the evidence, are whether the defendant promised to repay the plaintiff, and if she made such a promise, was it founded on a sufficient consideration. But neither the prayers for instructions, nor the charges given, appear to have considered whether the conversations between Philpot and the defendant constituted a promise. The charges refer it to the jury to determine, whether there was a promise, and maintain its validity, if there was one. Placing as we must do, the chancery record entirely out of view, and perhaps, it should be inferred that the defendant was benefitted by the satisfaction of the execution; if so, we have seen there would be a sufficient *executed consideration* to support an express promise. But however this may be, we think it perfectly clear that the jury were misled by the last charge, and, under the impression that the conversation between the witness and defendant proved a promise, they found for the plaintiff. Their verdict could not have been rested upon any other hypothesis. The court should have instructed the jury as to the effect of the evidence, instead of giving them a charge in such general terms, as would most probably induce them to find for the plaintiff, in the absence of evidence. If *the tendency* merely of the charge had been to mislead, the defendant

should have asked additional and explanatory instructions; but where it *will necessarily* mislead, and actually does, it is a fatal error. In the present case, an ordinary jury would certainly have supposed, that the evidence of a promise was sufficient, if they credited the witness, and the result shows that such must have been the influence, under which the verdict was found.

For the prejudicial effect of the last charge, the judgment is reversed, and the cause remanded.

RAGSDALE *vs.* BOWLES.

1. A count, which avers "that the defendant falsely, maliciously, and without probable cause, charged the said plaintiff with the crime of felony, and upon said charge, falsely, maliciously, and without probable cause, caused the said plaintiff to be arrested by his body, and to be imprisoned and kept and detained in prison for a long time, to-wit, for the space of one day then next following, at the expiration of which said time, he the said defendant caused the said plaintiff to be released and set at liberty, and wholly abandoned his said prosecution," is not a good count in case for malicious prosecution, but is a good count in trespass for false imprisonment.
2. If counts in case and trespass be joined, and the defendant demurs to one count only, the demurrer must be overruled. The mis-joinder can be reached alone by demurrer to the declaration.

Error to the Circuit Court of Pickens. Tried before the Hon. Samuel Chapman.

Bliss & Baldwin for plaintiff in error:

The demurrer of defendant below (plaintiff here) to the 3d count of the plaintiff's declaration, should have been sustained. That count does not aver the manner, nor the fact of the termination of the prosecution, alleged to be malicious.

1. It should have averred that the defendant was acquitted, or, at least, discharged from the prosecution. 2 Ch. Pl. 606, n. p.; 2 Greenl. Ev. § 452; 1 Har. Dig. 1458, § 3; 1 Ch. Pl. 679; 3 U. S. Dig. 1, §§ 6, 7, 8, and p. 4, §§ 81, 85, 90; Turner v. Walker, 3 Gill & Johns. 377; Smith v. Shackford, 1 Nott & McCord, 36; Thomas v. Graffenreid, 2 ib. 143; O'Driscoll v.

Burney, 2 ib. 54; Gorton v. DeAngelis, 6 Wend. 418; Goddard v. Smith, 11 Mod. 56; Patsank v. Marshall, Say 162; Lewis v. Farrall, 1 Stra. R. 114; Parker v. Lankey, 10 Mod. 145; Cole v. Hanks, 3 Monroe, 208; Feazle v. Simpson, 1 Scam. Rep. 32; Young v. Gregory, 3 Call, 446; Goddard v. Smith, 6 Mod. 162; Morgan v. Hughes, 2 T. R. 225; Davis v. Clough, 8 N. H. Rep. 157; Douglass 215, Fisher v. Bristow; 2 Selwyn, 1060; Commonwealth v. Wheeler et al., 2 Mass. R. 172; 7 Cowen 715, McCormick v. Sisson, and authorities cited.

2. The reason is, that there might be a conviction of plaintiff, after his recovery for being maliciously prosecuted—a reason which applies. See cases from Nott & McCord, *supra*, and 1 Stra. 114.

3. Some of the authorities hold that after a *nonsuit* or *nol. pros.* the action will not lie: Parsons, C. J., in 2 Mass. *supra*, saying that in such case the proper action is case for conspiracy. See also, 2 Nott & McCord, *supra*, denying dictum of Buller, J., in Durnf. & E., as to nonsuit being sufficient; and 3 Monroe and 2 Mass. *supra*.

4. The facts must be set out, to enable the court to judge whether the party has been legally discharged. Alleging such discharge, (much less abandoning of prosecution,) is not sufficient. 2 T. R. *supra*, 225; 1 Stra. 114; 3 Monroe, 208; 10 Mod. 145; 2 Nott & McC. 144—referred to above; and other cases before cited.

5. There is nothing unreasonable in the rule. The plaintiff below could have claimed his discharge before the justice.—Besides, he has an ample remedy in another form.

6. Secor v. Babcock, 2 Johns., shows only, that *after* a discharge by the justice, the action will lie; but the authorities seem to require more than this. The case of Cotton v. Wilson, in Minor, 203, was *after* verdict. The Court of Appeals in Virginia (2 Call) doubt, whether the omission of averment of discharge after verdict was cured.

E. W. Peck, for defendant:

The demurrer to the 3d count was properly overruled. The averment of the termination of the prosecution was sufficiently stated. After stating the imprisonment of the defendant in

error, under the charge made against him by the plaintiff in error, the declaration proceeds thus: "and at the expiration of which said time, he, the said defendant, caused the said plaintiff to be released and set at liberty, and wholly abandoned his said prosecution." An averment that the prosecution is ended is sufficient in this action, without stating in what manner it was ended. 1 Campb. 295; 2 Ch. Pl. 286; Secor v. Babcock 2 Johns. Rep. 204; Cotton v. Wilson, Minor Ala. Rep. 203.

DARGAN, J.—This was an action on the case for a malicious prosecution. The defendant demurred to the third count, and his demurrer was overruled, which is assigned as error. The objection to the count is, that it does not aver with sufficient certainty, that the plaintiff was acquitted of the charge preferred against him, or that the prosecution has been terminated by any judicial investigation. The averments are, that the defendant falsely, maliciously, and without probable cause, charged the said plaintiff with the crime of felony; and upon said charge, falsely, maliciously and without probable cause, caused the said plaintiff to be arrested by his body, and to be imprisoned, and kept and detained in prison for a long time, to wit: for the space of one day, then next following, and at the expiration of which said time, he the said defendant caused the said plaintiff to be released, and set at liberty, and wholly abandoned his said prosecution.

It is necessary, in order to sustain this action, to show that the prosecution has been determined and ended, and if this is not shown by the declaration, the defendant may demur. 2 Chitty, 607, & notes; 2 Greenl. Ev. § 452; 3 Gill & Johnson, 377; Morgan v. Hughes, 2 Term Rep. 225. The words employed by the pleader in this case, do not convey the idea with any reasonable certainty, that the charge was investigated judicially. That the defendant caused the plaintiff to be released and set at liberty, and abandoned the prosecution, does not show that the prosecution is ended by the judgment of any judicial tribunal, or that the defendant was discharged, after judicial investigation. The count is therefore bad, considered as a count for a malicious prosecution.

But we incline to think it a good count, if we consider it a

count for false imprisonment, and in this point of view, it is not necessary to examine, whether the form of action is trespass or case, for the demurrer being to this count alone, if it be a good count in trespass, the court should have overruled the demurrer, notwithstanding it is joined with two others in *case*. If counts, in *case* and trespass are joined, and there is a demurrer to one count only, it must be overruled, for the defendant can avail himself of the misjoinder only by demurring to the whole declaration. Chitty Pl. 206; Smith v. Merwin, 15 Wend. 184.

Considering this then, as a count in trespass for false imprisonment, and there is no averment in it that would prohibit its being so considered, the demurrer was properly overruled.

Let the judgment be affirmed.

O'NEILL *vs.* THE STATE.

1. Mere words do not constitute an affray; nor is a party guilty of that offence, who offers no resistance to an attack made upon him, although the attack is induced by insulting language used by him to the assailant.

Error to the Circuit Court of Lawrence. Tried before the Hon. George W. Lane.

The plaintiff in error was tried under an indictment, charging him with an affray. At the trial a bill of exceptions was sealed, by which it appears, that the State in support of the charge introduced a witness, who testified, that some time in 1844, the defendant rode up to where the witness was sitting in the town of Moulton, and applied to him many opprobious epithets, such as thief, liar, rascal, &c.; whereupon the witness caned him, but the defendant made no resistance, further than to throw up his hands to protect his head, and neither struck nor attempted to strike the witness. Upon this evidence, the accused requested the court to charge the jury, that mere

words would not constitute an affray, which charge the court refused to give, but charged the jury, that an affray was the fighting of two or more persons willingly in a public place, and that if one used insulting language to another, calculated to bring on a fight, and in consequence thereof the person insulted attacked the person using the insulting language, both were guilty of an affray, whether the person attacked resisted or not. To the refusal of the court to charge as requested, and to the charge given, the defendant excepted, and now assigns them as error.

T. M. Peters, for plaintiff:

1. The court erred in refusing to charge as asked. No quarrelsome or threatning words will amount to an affray—much less then, will mere words of abuse. To constitute one an affrayer, he must actually engage in the fight, either by striking or offering to strike, or by drawing a weapon to intimidate. Archb. Cr. Pl. 564; Rosc. Cr. Ev. 198; 1 Russ. Cr. 271; 1 Jacob Law Dict. 65; 3 Inst. 158; Cushman v. Ryan, 1 Story Rep. 92; 1 Hawk. Pl. 135; Wharton's Dict. of Jurisprudence, *verb. affray*, 30.

2. The court erred in the charge defining an affray. An affray is a skirmish or fighting between two or more persons in a *public place*, to the terror of the *by-standers:* and it is called an affray because it *disturbs* the public peace, by *affrighting* or making men afraid. The "*affrighting*" or "putting in fear" is one of the ingredients of the offence. For if it be a fighting in a *private* place, or there be none else present to be made afraid or terrified, except the combatants, then the offence is but an assault, or an assault and battery. 4 Black. Com. 145; 1 Hawk. Pl. 134, 135; 3 Inst. 158; 1 Bouv. Law Dictionary 90; Rosc. Cr. Ev. 198; 1 Russ. Cr. 271; Archb. Cr. Pl. 564; Wharton's Dic. of Jurisp. 30, and the *descriptions* of the offence in all the precedents of indictments for *Affrays*. See also, Sampson v. State, 5 Yerg. Tenn. R. 356.

Attorney General, for the State:

1. There may be an affray without any actual violence—the terror it produces to the citizens, being the gist of the offence. 1 Russell on Crimes, 271.

2. The slightest participation in a misdemeanor is a misdemeanor, and so if a person should use provoking language towards another, calculated to bring on a difficulty and which does produce that result, this would be such a participation in a misdemeanor as to render both guilty of an affray, although the party provoked fought so fast, that the party using the provoking language, did not get a chance to strike, for the intention must be taken for the act.

DARGAN, J.—An affray is the fighting of two or more persons in some public place, but no quarrelsome words merely, will constitute this offence. 1 Russell, 271; Archb. Cr. Pl. 564; 1 Hawk. 135; 5 Yerger, 356. It is probable, however, that if persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offence, without coming to actual blows. 1 Russell 271. Yet no authority goes so far as to hold that mere vulgar or low abuse, can constitute this offence. We think, therefore, that the court erred in refusing the charge requested, that mere words would not constitute an affray, and also in charging, that if one used insulting language to another, in consequence of which, the person insulted attacks the one insulting him, the party attacked is guilty of an affray, whether he resisted the attack *or not.*

Let the judgment be reversed and the cause remanded.

COOK & MITCHELL Ex'rs. &c., *vs.* P. L. LEWIS & WIFE.

1. J. C. C., by his will, directs his executors to retain the sum of two thousand dollars in their hands, for the purpose of building a house for his daughter Caroline, the wife of P. L. L., and *her children* (of whom she has four), at such time and place as they may all agree upon. P. L. L., in anticipation of the action of the executors, has a house erected on his own premises, worth two thousand dollars, and afterwards, in conjunction with his wife, files a bill against the executors, alleging the

erection by him of the house, and asking that the executors be decreed to pay over to them the two thousand dollars:—*Held*, that the bill is wanting in equity, and should have been dismissed.

Error to the Chancery Court of Russell. Before the Hon, Wilie W. Mason, Chancellor.

THE facts of this case appear in the opinion of the court.

BELSER & HARRIS, for plaintiffs in error:

1. The entire clause of the will above referred to, shows that the $2000 directed *to be retained* in the hands of the executors, is a separate estate for the benfit of the wife and children, and the legal title is in the executors.

2. If it be not a seperate estate, the chilren of the wife are equally with her interested in the bequest, and the decree for the full amount of the $2000, *under the facts*, is erroneous, Dunn and wife v. The Bank, 2 Ala. 152.

3. If the bequest be neither seperate nor joint, as contended by complainants, the court will decree before giving relief, that a settlement be made for the benfit of the wife and children.

HEYDENFELDT & MCLESTER, for defendants.

CHILTON, J.—The fourth item in the will of James C. Cook, to be considered, is in the following language: "I give unto my daughter Caroline Lewis, and her children, twenty negroes, which I cannot name; but the same are to be selected and taken out of the balance of my negroes, by families as nearly as can be, after my wife makes her selection. My will and desire is, that when the selection of the negroes is made, Wm. H. Mitchell and James Cook, my son, whom I hereby appoint as trustees for the purpose, do control and have the management of one half the number of the said twenty negroes, to be divided as equally as can be, and to be designated by name, and their future increase. I also give unto her and her children five thousand dollars in cash, as soon as can be collected, to be put at interest for the benefit of Caroline Lewis and her children, by said trustees. *This I wish to be a separate estate, both the money and the negroes*, and not to be subject in any event to the debts or liabilities of her husband, Mr,

Lewis, or any other husband on second marriage. I also wish my executors to retain and keep the sum of two thousand dollars in their hands, for the purpose of building a house for Caroline and her children, at such time and place as they may all agree upon; they constructing and paying for said building with said sum." The two thousand dollars last mentioned is the subject of the present suit. The bill is filed by the husband and wife, and avers that the complainants, "relying upon the provisions of the said will, and not wishing to be delayed by the want of action of the executors, provided and had erected a convenient and comfortable house, of the value of two thousand dollars, anticipating the same to be repaid and refunded by the executors of the said James C. Cook, under the said provision of his will: That said executors are Wm. H. Mitchell and James Cook, who qualified as such, and who refuse to pay to the complainants said sum of two thousand dollars, although they have made no objections whatever to the house built by them."

The defendants in their answer insist, that the object of the testator was to vest this $2,000 in them, for the separate use of the wife of said Lewis and her children, to be by them appropriated in the erection of a house for the benefit of said Caroline and her children; and that the said P. L. Lewis having a house already erected, suited to the condition of Caroline and the children, they purchased it of him at the price of $2,000, which was a just equivalent for it, and took his deed to them for the premises, to have and to hold to them in trust for the benefit and use of said Caroline Lewis and her children, *as her sole and separate estate.* It is consented, however, that this deed is not to prejudice the claim of the complainants.

The case having been submitted by consent on the bill and answer, the Chancellor decreed, that the clause in the will did not vest a separate estate in the wife of Lewis, and ordered the defendants to pay the $2,000 to the complainants, and also decreed against the defendants the costs of the suit, to be paid out of their testator's estate.

We are at a loss to see upon what principle this decree can be sustained. The legacy was vested by the will in trustees, to be by them expended in the erection of a house, for the use and benefit of Caroline Lewis, *and her children,* at such

time and place as *they all* may agree upon. The bill charges no default upon the executors in failing to erect, or in agreeing upon the time and place for the erection of the house; but the ground of complaint is, that the complainants, having erected a house worth $2000, the trustees would not pay them that amount of money.

If we grant that the marital rights of the husband attach to the interest which his wife has in the legacy, he could not recover, as husband, more than her share, which is equal only to that of each of the children. But *they* are thrown in the back ground, as though they had no interest whatever, and are not before the court. Laying out of view, the deed which Lewis executed to the trustees, (and which can form no predicate for the decree, as it is consented that the complainants are not to be prejudiced by it,) what security for their rights, have the children? In what house have they an equal interest with their mother? Where are their muniments of title to the premises? These matters are not set forth in the bill, and the decree of the chancellor passes by them *sub silentio.*

It is very clear that there is nothing in the will from which we can infer that the testator intended to create an estate in this legacy, or in the house which it was designed to pay for, to the sole and separate use of Mrs. Lewis. The investment was to be made, doubtless with the intention, on the part of her father, the testator, to provide her and her children with a home: a house is to be erected for their joint use by the trustees. By the well settled rules of equity, we must regard this fund, which is required to be laid out in real estate, as subject to the same rules which apply to such estate. Had the trustees invested the fund as contemplated by the will, it is clear, the children of Mrs. Lewis, as well as herself, would have had the right to have occupied it. Now, whether the wife has such interest as can be made subject to the husbands debts, is a question not before us. See Hale vs. Stone, 14 Ala. R. 803, where the authorities are collected, as to the creation of a seperate estate; also 12 Ala. Rep. 682. In no view of the case, whether we look alone to the bill, or to the bill and answer, can the decree be sustained.

It is therefore reversed, and the bill must be dismissed at the cost of the defendants in error.

BARNES *vs.* BLAIR.

1. An instrument in the following words: "Received, Mobile, 24th April 1845, of James Barnes, six hundred and fifty dollars for a negro slave, named Joe, about twenty-five years old, sound and healthy, the title to the same I fully guarantee," does not import a warranty of soundness.
2. Where there is an express warranty in one particular, the law will not imply it in another.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

Lockwood, for plaintiff:

1. The instrument declared on contains a warranty of the soundness and healthiness of the slave, and imports an agreement to that effect. Cramer v. Bradshaw, 10 Johnson, 484; Gilchrist v. Morrow, 2 Car. Law Rep. 607; Ayres v. Parks, 3 Hawks, 59; Houston v. Gilbert, 3 Brevard, 53; 2 J. J. Mar. 129; Chapman v. March, 19 Johns. 290; Cook v. Mosely, 13 Wend. 277; Hastings v. Lovering, 2 Pickering, 214; Hegins v. Plympton, 11 do. 97; 2 Humphey, 305; Gardner v. Gray, 4 Camp. 144; Bridge v. Wain, 1 Stark. 504; Zotes v. Pym 6 Taunt. 446.

Campbell, contra:

The warranty in this case, is confined to the title, and does extend to the condition and health of the slave. No warranty of soundness is implied, and before it can be inferred there must be a clear intention. If it is a matter of doubt, the conclusion would be that the warranty was not intended. The collocation of the words in the bill of sale show, that no warranty was intended. 8 Bingham, 48, (21 Serg. & L.) 217, S. C.; Smith & Norton v. Miller, 2 Bibb, 616; Loper v. Breckenridge, 4 Missouri, 14; Thos. Wason v. Elijah Rowe, 16, Ver. 525; Cheves, S. C. Rep. 186; Rice Rep. 437; 20 John. 196; 1 Murphey, 138; 3 Stew. Rep. 140.

DARGAN, J.—This was an action of assumpsit, for the false warranty of a slave, sold by the defendant to the plaintiff, and which the plaintiff contends was warranted to be sound.

The bill of sale is in the following language: "Received, Mobile 24th April 1845, of James Barnes, six hundred and fifty dollars for a negro slave named Joe, about 25 years old, sound and healthy; the title to the same I fully guarantee." I admit that there are several decisions to be found, which hold that this bill of sale should be construed as containing a warranty of soundness. See Cramer v. Bradshaw, 10 Johns. 484; Gilchrist v. Morrow, Carolina Law Rep. 607; 3 Hawks, 59. These decisions however rest upon the ground, that the words, "*sound and healthy*," constitute an averment of a fact, and therefore amount to a warranty; but no notice was taken of the circumstance, that there was an express warranty of title, immediately succeeding them, which in our opinion is very material in arriving at the correct intention of the parties, and which is the true test whether the contract of sale contains a warranty of soundness or not. The natural impression that the words used in the bill of sale would seem to convey is, that the seller represented the slave to be about twenty-five years old, *sound and healthy*, and that he undertook to warrant the title only, and we think this is the proper construction to be given to it. We admit that if the bill of sale had not contained an express warranty of title, that the affirmation made, that the slave was sound and healthy, would have constituted a warranty of soundness, but when we see immediately following the words, sound and healthy, an express warranty of title by the use of the words, "the title to the same I fully guarantee," we think the intention of the seller was to warrant the title alone, and the words, "about twenty-five years old, sound and healthy" are words of description, and not a warranty either as to the age or health of the slave. In the case of Budd v. Fairmaner, 8 Bingham, 48, the bill of sale was: "Received of Budd, ten pounds for a gray four year old colt, warranted sound:" the complaint was, that the colt was only three years old, and the question was whether the warranty extended to the age of the colt. Chief Justice Tindal said, that where there is an express warranty to a single point, the law will not imply another; and it was held by all the judges, that the warranty extended to the soundness alone, and not to the age of the colt. So in the case of Dickinson v. Gapp, cited in the opinion of the court last referred to: the

bill of sale was, "Received of D., one hundred pounds for a bay gelding, got by Cheshire Cheese, warranted sound:" the breach alleged was, that Cheshire Cheese was not his sire. It was held that the warranty extended to the soundness of the horse and not to his pedigree. In the case of Smith v. Norton & Miller, 2 Bibb, 616, the bill of sale was almost identical with the one now before us; the court determined, that the warranty extended to the title only, and not to the soundness of the slave. These citations are sufficient to show at least, that there is a want of harmony in the decisions on this subject, and we are therefore left free to construe this instrument, as if the question was *res integra*. The intention of the parties is the material inquiry, and *that* we must gather from the entire instrument, and not fix on any word a particular legal import, irrespective of the connexion it bears to the other words used in the bill of sale. The words sound and healthy, had they stood alone, and not in connexion with the subsequent warranty of title, would have been construed as importing a warranty of soundness, because we should have inferred that such was the intention of the seller, but when they are immediately followed by an express warranty of title, we cannot attach that meaning and intention to them, for we do not believe *the parties* intended to fix that meaning on them, but that they intended, what seems to be the natural and plain import of the whole instrument, that is, to represent the negro as about twenty-five years old and in good health, and that the seller warranted the title.

The ruling of the Circuit Court is in conformity with this view, and the judgment must be affirmed.

SCHUISLER & DONNELL *vs.* AMES.

1. If a tenant abandons the premises before the expiration of the term, the landlord may suffer them to remain vacant and recover the rent, or he may enter and determine the contract, in which event he would be entitled to recover only for the rent then due:

Error to the Circuit Court of Montgomery. Tried before the Hon. George Goldthwaite.

This was an action by a landlord against his tenants to recover rent. The proof conduced to show, that the defendants leased a store of plaintiff for one year, ending the first of November 1844. At the expiration of the term, they held over without a renewal of the lease. The defendants were partners, and in January 1845, dissolved their partnership, and abandoned the premises. They however, paid the quarter's rent falling due February 1845. In August 1845, the plaintiff rented the store to Donnell, one of the lessees, who took possession and occupied it alone. The court charged the jury, that if the defendants held over, after the determination of the lease, the plaintiff was entitled to recover the two quarters rent, falling due the first of May and August 1845. The defendants excepted to the charge, and now assign it as error.

Martin & Baldwin, for plaintiffs in error:

1. The plaintiffs in error were in possession, pending a treaty for a further lease from 1st of November, and were not tenants from year to year. Taylor's Landlord and Tenant, 42.

2. The fact that three or four days had transpired before the treaty for a subsequent lease was entered upon, cannot affect the plaintiff's rights, if this state of things was acquiesed in by the defendant in error, and should have been submitted to the jury. The court assumed to pass upon the testimony in contravention of the rights of the jury.

3. An eviction by the landlord discharges the tenant from the payment of the whole rent. Chitty on Con. (last edit.) 329; Taylor's Landlord and Tenant, 183; Smith v. Raleigh, 3 Camp. 513; Gramman v. Legge, 8 B. & Cress. 324.

4. The court erred in the charges given, and the charges refused. Authorities referred to.

Pryor, for defendant:

1. The plaintiffs in error held the premises from first November 1844, to first November 1845, at four hundred dollars a year, payable quarterly, viz, 1st July, 1st May, 1st August, and 1st November 1845. Ames v. Schuisler & Donnell, at former term of the court.

2. The right of Ames to recover each quarter's rent was perfect on the day it became due, and he could have main-

tained an action for such quarter's rent, immediately after the day. See Marseilles v. Kerr, 6 Whart. 500.

3. The renting of the premises to Donnell, one of the plaintiffs in error on 1st of August 1845, was not an eviction of the tenants, for he was one of the tenants, and Ames was not bound to consult both of the partners, when he and the other partner agreed to abandon the contract from 1st August 1845. The renting to Donnell from 1st August 1845, could amount to nothing more than an abandonment of the contract for the residue of the year. It was not a recission of the contract, for a recission puts the parties *in statu quo.* Here they could not be put *in statu quo,* for the tenants had in legal contemplation rented the premises for three quarters. It was then a mere abandonment of the contract. This abandonment did not affect the plaintiff's right to recover the two quarters rent due at the time of the abandonment—that right was perfect. There is no evidence that Ames knew the plaintiffs in error had dissolved their copartnership, at the time the contract was abandoned, and he might well deal with one only. But if he had known of the dissolution, he would not have been bound to consult both of the partners, for one of them was fully competent to enter into a new contract with the landlord for the premises.

4. The first prayer for instructions was properly refused. The action was brought to recover rent, upon an executed contract, which could be given in evidence under the general counts. Patterson, Ex. v. Bank Columbia, 7 Cranch.

5. The counsel for the plaintiffs in error admits, that Donnell, the partner who rented the premises from 1st August 1845, is liable for the two quarters rent, because he assented by renting the premises on said day to the act of the landlord. But if the landlord can recover, he must recover on the *contract,* and the *contract* was made with both of the plaintiffs in error. No action therefore can be maintained against Donnell alone. The contract was *executed,* for the two quarters rent claimed in the action, at the time Donnell rented, &c., and nothing which the partners did afterwards could change the *parties* to *the executed contract.*

DARGAN, J.—When this cause was before this court at

a previous term, we held, that where there was a lease at a stipulated annual rent, and the tenant held over without making any new agreement as to the rent, the law implied a contract of renting from year to year, at the original rent agreed on. 14 Ala. 600. It is now shown that the defendants abandoned the premises in January 1845, and in August the plaintiff entered into a new contract, by which he leased the store to one of them alone, and it is contended, that this renting discharged the other tenant from the rent that had fallen due, and which remained unpaid at the time of the lease to Donnell.

It is not necessary to determine whether the defendants would be discharged from the rent that had fallen due, if the landlord, before the term expired, had entered upon the premises and actually expelled them: but we think it very clear, that if the tenants abandon the premises altogether, the landlord is not bound to let them remain vacant, during the entire term, in order to retain the right to recover the rent then actually due. But he may enter, and from that time the contract is determined, but his right to recover the rent due at the time of his taking possession, is not thereby lost. In the case of Marseilles v. Kerr, 6 Whart. 500, the plaintiff had leased a store to the defendant, who took possession, and then abandoned the premises. The plaintiff gave him notice that he should re-rent the store, but would hold him liable for the time it remained unoccupied. The plaintiff afterwards leased the store to another and sued the defendant for a quarter's rent. The court held that the defendant was liable for this quarter's rent. See also 7 Watts, 123. This decision seems to be in accordance with justice. If the tenant abandons the premises, the landlord ought not to be bound to suffer them to remain vacant during the term. Indeed it might often be more injurious to him to let them lie idle and unoccupied, than it would be to lose the rent, and he may be compelled to enter to avoid this greater loss. An entry under such circumstances should not discharge the tenant from the rent, that had accrued and was due. The entry, however, puts an end to the contract from that time, but does not release the tenant from the rent then due and unpaid. To hold otherwise, would be to enable the tenant, by abandoning the premises, to compel the landlord in many instances to release the rent due, by making

an entry, or to submit perhaps to greater loss. The correct rule, we think, is that if the tenant abandons the premises, the landlord may let them lie idle and recover rent for the whole term, or he may put an end to the contract of lease by entry; if he does so, he can only recover the rent actually due at the time he takes possession. The ruling of the Circuit Court was in accordance with the law as here expressed.

Let the judgment be affirmed.

NOBLE ET AL. *vs.* COLEMAN & GUNTER.

1. In an action of trespass to try titles, instituted against a mortgagor in possession, the mortgagee, if entitled to the right of entry, may be admitted as a party defendant.
2. The possession of real estate by a vendor, after an absolute sale, is not of itself presumptive evidence of fraud, but is a circumstance merely from which fraud may be inferred, and as such is properly submitted to the jury.

Error to the Circuit Court of Montgomery. Tried before the Hon. George Goldthwaite.

THIS was an action of trespass, to try titles to two lots of ground in the city of Montgomery, and was instituted by the plaintiffs in error against Robert C. Coleman, one of the defendants. At the trial, Charles G. Gunter moved the court to admit him as a party defendant, on the ground, that he claimed to be the true owner of the lots in controversy, and that said Coleman was his tenant at will, and held under him. The plaintiffs objected, but the court, notwithstanding, granted the motion, and Gunter was made a defendant. The plaintiffs in support of their title introduced in evidence six justices' executions in their favor against Coleman, with the judgments on which they issued, and proved a levy of them on the lots in question, an order of sale by the Circuit Court of Montgomery county at its fall term 1847, a sale by the sheriff under said order, and a purchase by them at such sale, on the first Monday in February 1848. They further proved, that said Coleman was in possession of the lots at the date of the

rendition of their judgments in the justices' court, and had continued in possession ever since: that Coleman had been notified to quit before suit brought, which was the 14th Feb. 1848, and that the debts, on which their judgments were founded, originated in 1845. The value of the rents was also shown by them. The defendants then read in evidence a deed of trust from said Coleman to Gunter, dated 17th April 1847, to secure an indebtedness of the grantor to the grantee to the amount of $1845.00, which deed embraced the lots in controversy and four slaves. They also proved the *bona fides* of the debt provided for by the deed, the sale of the trust property according to its provisions, and the purchase of it at such sale by Gunter, on the first Monday in March 1848. The plaintiffs in rebuttal proved, that said Coleman retained possession of the slaves, as well as the lots, both before and since Gunter's purchase that he hired one of them to the city Council of Montgomery, and received the hire before and since Gunter's purchase; that for five or six years he had been Marshal of the city of Montgomery, with a salary of from six hundred to a thousand dollars, and that Gunter, since 1843, has been laboring under considerable pecuniary embarrassment.

The court charged the jury, that the retention of possession of the personal property by Coleman, after the sale, was *prima facie* fraudulent as to it, but that a different rule prevailed in respect to the real estate: that Coleman's possession of the real estate, after the sale and purchase by Gunter, was not of itself presumptive evidence of fraud, but was simply a circumstance tending to show fraud, the weight of which was to be determined by the jury.

The plaintiffs excepted to the ruling and charge of the court, and now assign them as error.

NOBLE, for plaintiffs in error:

1. It will be seen by the record in this case, that the plaintiffs purchased the mortgaged premises under execution, at sheriff's sale, on the first Mouday in February 1848, and that the mortgage was not foreclosed by sale until the first Monday in March following. Now we contend that the plaintiffs are entitled at all events to this one month's rent, upon the ground, that Coleman, the mortgagor, was not responsible to

Gunter, the mortgagee, for rents and profits, until the latter had foreclosed his mortgage, and that therefore the court erred in permitting Gunter to defend as the landlord of Coleman for said month. The proposition, that the mortgagee is not entitled to rent until final foreclosure and entry, is too clear to admit of doubt. See Field v. Swan, 10 Metc. R. 112; ib 126; 1 Pickering Rep. 87; 4 Conn. Rep. 235; 4 Kent, 154 to 156; 3 Ala. Rep. 357.

2. Fraud, when the facts are ascertained, is a question of law for the determination of the court. 9 P. Rep. 39; 1 S. 72; Sturtevant & Keep v. Ballard, 9 Johnson's Rep. 337. In Doane v. Eddy, 16 Wend. 523, the court would not submit the question of fraudulent intent to the jury. Upon the facts set forth in this record, the court are asked to pronounce this sale fraudulent. Here are all the badges of fraud in Twyne's case or that can be enumerated. Here the relation of debtor and creditor existed—the debtor after absolute sale retains possession as before—he hires out the negroes and receives the hire—he receives the rents and profits of the lots and dwellings—in failing circumstances at the time the mortgage was given, and after the sale utterly insolvent. The mortgage and sale was a general one, conveying every thing visible he owned, even to the badge of fraud in the mortgage, where conscious guilt seeks to hide itself under the special recital: "*Whereas I am justly* indebted," &c. Look on the other hand at the utter improbability, not to say moral impossibility of the *bona fides* of this sale—Gunter, through the whole period of these transactions *pressed* for money, borne down by his debts, the sheriff following him for five years, and 32,000 dollars of executions hanging over him. What is the situation of Coleman, all this while? utterly insolvent it is true, but like many of the *honest* insolvents, who adorn the society in which they move, he has been in the use, possession, and control of houses, lots and negroes, and in the possession of a lucrative office, of near one thousand dollars per annum.

3. It may be said however, that this was a public sale, and that the world had notice and that therefore possession by the mortgagor was not fraudulent. But it matters not, either as to a judicial sale or a public sale with notice, where the relation of debtor and creditor exists, possession, subsequent to the

sale and not in accordance with the deed, is *prima facie* evidence of fraud. See the opinion of Judge Kent, in Sturtevant and Keep v. Ballard, 9 Johnson, 337, and the authorities there cited. The grantee or mortgagee of a fraudulent deed is responsible for rents, after the insolvency of the grantor or mortgagor. Therefore, if this sale be fraudulent, Gunter is answerable to plaintiffs for rent up to the present time. Sands and others v. Codwise, 4 Johnson, 536. The decision upon this point is asked from the fact, that it may facilitate the collection of the rent in this case.

4. As to the constructive fraud, it is the well settled law every where, that the retention of personal property by mortgagor or vendor, after absolute sale, is fraud in law, either *per se* or *prima facie*. Alabama has adopted the latter rule, but requires full and satisfactory evidence to be given in explanation of such possession from facts and circumstances *existing at the time*, otherwise, it is conclusive of fraud. Maulden & Terrell v. Mitchell, 14 Ala. Rep. 814; 2 S. 336; 5 Ala. Rep. 531. But it is said that this rule does not apply to real estate; 3 S. 95, was a case of real property. The court by way of *obitur dictum* intimate that the same presumptions do not arise from the possession of real as personal estate, but the court examined the case with as much scrutiny as if it had concerned personality alone. In 6 Ala. Rep. 179, is the case of a mortgage of real and personal property, as in this case, and the court pronounced it fraudulent, but said not a word as to any distinction between realty and personalty. At all events if there be a difference between realty and personalty, that can only apply where they are seperate and distinct transactions, and not as in this case, both contained in the same mortgage and sale: For as between the same parties to the same deed, the maxim applies, fraud in part, fraud in all. And to decide differently would seem to make a distinction without a difference, for the law expressly says, that it does not hold these sales to be fraudulent from any arbitrary or technical rules, but *because possession* unexplained affords *incontestible* evidence of fraud. But there is no difference. In a recent case in Georgia, this question has been directly decided, and the court unanimously held, that there was no difference. See 2 Kel. Geo. Rep., first case and the authorities there cited.

T. & J. Williams, J. A. Elmore & W. L. Yancey, for defendants:

1. The circuit court has the power to admit a landlord in to defend, where his tenant at will is sought to be ejected. Clay's Dig. 321, § 49; Doe, *ex dem.* Davis vs. McKinney, 5 Ala. Rep. 719; Thompson v. Ives, 11 Ala. Rep. 239; Falkner v. Jones & Leith, 12 Ala. Rep. 165; Elmore & Willis v. Harris, 13 Ala. Rep. 360.

2. The possession by a vendor after an absolute sale of personal property, unexplained, is based upon the legal presumption, that possession of personalty draws to it the title, and is calculated to give to the possessor a fictitious credit. Hobbs v. Bibb, 2 Stewart, 54; Bank of Ala. v. McDade, 4 Porter, 267; Simerson v. Branch Bank at Decatur, 12 Ala. Rep. 213.

3. The principle upon which those decisions rest, cannot be made to apply to the possession of realty—the possession of which does not draw to it the title, and which therefore affords no ground for credit.

4. The possession of the property in this case by the mortgagor, after foreclosure, does not come within the principle that makes possession of personalty after an absolute sale fraudulent, because a mortgage sale, after public notice, is a public sale, and gives notoriety to the transaction. Simerson v. Branch Bank at Decatur, 12 Ala. Rep. 213; Bank of Ala. v. McDade, 4 Porter, 267; Starkie' Ev. 615.

5. It is not pretended that Coleman was not a *bona fide* debtor to Gunter—the *bona fides* was established, therefore the fact that the mortgagee became the purchaser at the sale cannot prejudice the case. Simerson v. Branch Bank at Decatur, 12 Ala. Rep. 213.

COLLIER, C. J.—The third section of the act "for the relief of tenants in possession against dormant titles" provides, "that in any suit for the recovery of lands and tenements, which shall be commenced against any tenant for years, at will, or sufferance, it shall be lawful for his or her landlord to enter him or herself a defendant to such suit, and such landlord shall be solely entitled to all the benefits and provisions of this act:" Clay's Digest, 321. In Doe, *ex dem.* Davis v. McKinney and another, 5 Ala. Rep. 719, we said, "the terms

of this enactment are certainly broad enough, if literally interpreted, to extend to all cases, and it would really seem that no inconvenience would result from allowing it thus to operate. By making himself a defendant, the landlord cannot urge as a defence any matter, which the law did not previously recognize as available, to defeat a recovery by the plaintiff. The provision of the act cited does not affect the parties rights, it relates only to the remedy. As then it was not allowable for the defendant in an execution to defeat the purchaser by showing he held under another, so, neither can the landlord when let in to defend, set up a title consistent with the possession sought to be recovered. It is immaterial to him whether the plaintiff recovers the possession or not, for as soon as he comes in, he will be liable to all the burthens and incur all the responsibilities which rested upon the defendant as a tenant. In fact, the recovery of the purchaser, so far as the landlord is concerned, effects nothing more than the substitution of one tenant for another." It was also added, that if it was an error to permit the landlord to defend, it was one that could work harm to no one, and consequently was not fatal to the judgment. This argument was reiterated in Thompson v. Ives, 11 Ala. Rep. 237, where we said, by way of admonition, that a landlord should be cautious in making himself a defendant in conjunction with, or instead of his tenant, where the latter holds under a lease for an unexpired term, lest upon a general verdict against him, he might be estopped from asserting his title at the expiration of the lease. In Falkner v. Jones and another, 12 Ala. Rep. 165, it was held, under the statute cited, that it was not necessary the technical relation of landlord and tenant should exist, but the act extends to all persons claiming title, consistently with the possession of the occupier. See also Elmore & Willis v. Harris, 13 Ala. Rep. 360.

In all the cases cited, the plaintiff claimed as a purchaser at a sale under execution, seeking to recover the possession of the defendant in execution, and thus far they are precisely analogous with that now before us. The fact that the plaintiffs in the present case purchased the premises in question one month before the defendant, Gunter, purchased at the sale under his mortgage, and that therefore they were entitled to rent for the intervening time, even conceding such to be the law, we think

altogether immaterial, and cannot exempt the case from the influence of the statute. The primary object of the suit is the recovery of the possession, the damages are but secondary and consequential, and if the plaintiff in such action fails to make out a title, which entitles him to the land, he cannot have a verdict for damages, whatever his rights may be in respect to the rent. This is a proposition which is sufficiently illustrated by its statement. But it may be asked, although a mortgagor, remaining in possession by the permission of the mortgee, is not bound to account for rents and profits, unless they are specially pledged, does it follow if he leases or relinquishes to another, that the person thus substituted, can hold the premises free of rent? See Chamber's et al. v. Mauldin, et al. 4 Ala. Rep. 477. The case does not require an answer to this question, and we merely propose it, to exclude a conclusion. It results from what has been said that the Circuit Court did not err in permitting Gunter to become a defendant.

2. It cannot admit of serious question, that the charge in respect to the retention of the possession of the personal estate by Coleman was expressed in terms quite as strong and favorable for the plaintiffs as the law, under the facts disclosed, justifies. Hobbs v. Bibb, 2 Stew. Rep. 54; Ayres v. Moore, Id. 336; Mauldin & Terrell v. Mitchell, 14 Ala. Rep. 814. We do not understand this to be controverted; but it is insisted that the rule is not less rigid when applied to land, and to sustain this argument we have been referred to Peck v. Land, 2 Kelley's Rep. 1. In that case, the judge of the primary court charged the jury, that "possession of land remaining with the vendor, after absolute deed, is not under the statute of 13 Elizabeth, c. 5, an evidence of fraud." In reviewing this charge, the Supreme Court said: "It is true that the ownership to lands is usually evidenced by deed and other written muniments of title. Still in real, as in personal property, we hold, that if the vendee take an absolute conveyance, and nevertheless leave the property in the possession of the vendor, it is *prima facie* evidence of fraud. If a man convey his land absolutely, and yet is allowed to continue in possession as its absolute unqualified owner, this will be a proof that the conveyance is fraudulent." We cannot stop critically to examine this proposition, but we would remark, that we have looked

into the citations of the court from *Atkins* and *Johnson*, and with all deference, we cannot think that they maintain, that the retention of the possession of real estate, *as an isolated fact*, is presumptive evidence of fraud, which would constrain a jury to find against the conveyance. If the vendor was permitted to exercise such a dominion over the land, as indicated that he was the "absolute and unqualified owner," then, perhaps, in the absence of countervailing evidence, fraud would be a legitimate deduction. In Smith v. Lowell, 6 N. Hamp. Rep. 67, a debtor in embarrassed circumstances made an absolute conveyance and continued in possession fourteen years afterwards: *Held*, that the possession of the vendor for so long a time unexplained was *prima facie* evidence, that the conveyance was made to defraud creditors; that it was not enough to show, that it was intended to secure "some debt," or that it was made in payment of a debt, "it should have been shown that the debt amounted to the fair value of the land." In Every v. Edgerton, 7 Wend. Rep. 259, it was decided, that the "simple circumstance that the grantor remained in possession," after he had parted with his title by giving a deed, did not make the deed void; "in relation to real estate, that is not even a badge of fraud."

The cases, in which so much potency is accorded to the fact of possession remaining with the vendor, relate to personal property. True, the possession of land by the vendor, for an unreasonable time, or under circumstances indicative of *mala fides*, or inconsistent with the idea of a sale, would furnish a strong reason for pronouncing against the validity of the sale. But the mere failure to relinquish the immediate possession to the vendee, cannot *per se*, in the absence of an explanation accounting for the delay of the vendor to yield it to the vendee, be regarded as such strong evidence as will necessarily make the transfer fraudulent. Paulling v. Sturgis, et al. 3 Stewart Rep. 95.

Roberts in his treatise on fraudulent conveyances (p. 548, *et seq.*) in commenting upon the fact of possession by the vendor as inconsistent with an absolute conveyance, says: "the natural consequences of this contradictory possession involve a two-fold injury. The beneficial interest in the goods so circumstanced belongs either to the assignor or assignee; if

they belong to the assignor, he might be enabled by his mock transfer, if it could prevail, to continue to himself the enjoyment of *that*, which in conscience belongs to his creditors; if they really belong to the donee or assignee, the possessor might be enabled to attract to himself an illusory credit, against which ordinary prudence is an insufficient guard. But the degree of inconvenience produced by this separation of the property from the possession depends greatly upon the nature of the thing, the property in which is transferred. The property in some things is not wholly ascertained by the possession, and the nature and condition of other things may preclude the possibility of a specific transfer at the moment of the sale. Thus where *land* is conveyed, the want of possession casts a less degree of suspicion upon the transaction, than where *goods* are the subject of the conveyance, for with respect to land, the property is evidenced by possession of the title deeds, and manual occupation is no criterion of ownership. But in looking for the real owner of *moveable chattels*, we regard the possession as indicating the proprietor, since they are not only capable of specific delivery, but are ordinarily *used* and enjoyed by being *possessed*. Land is enjoyed and possessed by the title, and fraud in the transfer of it is mainly to be inferred from the inconsistency of the title with the possession of the title deeds." *Again*, (p. 554, *et seq.*) it is said, the leading object of the statute of 13 Elizabeth, ch. 5, was to prevent those collusive transfers of the legal ownership, which place the property of a man indebted out of the reach of his *bona fide* creditors, and leave him to the beneficial enjoyment of *that* which ought in conscience to be open to their legal remedies. Possession therefore of land, after an absolute conveyance, is evidence of a fraudulent design within the statute; and if this possession be accompanied with acts of ownership, the evidence of fraud becomes very hard to be resisted. But such possession is only evidence of fraud, by being a strong indication of a secret trust and reservation. In Hildreth v. Sands, 2 Johns. Ch. Rep. 35, it was said, possession of land, and taking the profits after an absolute conveyance, is an evidence of fraud, within the statute of frauds, unless such possession be consistent with the terms and object of the deed, or the character of it be openly and explicitly understood. See also

Codwise, et al. v. Sands, 4 Johns. Rep. 586; 2 Ves. jr. Rep. 292; Fitler v. Maitland, 5 Serg. & W. Rep. 307.

If the conveyance was recorded, there would be no ground for holding that the sale was *prima facie* fraudulent, merely because the possession of the vendor was not promptly yielded, but then it would be incumbent on the creditor who assailed it to rest the imputation of fraud upon some other hypothesis. So, although there may be no registration of the deed, yet if it was executed *bona fide* and for a valuable consideration, the want of a change of the possession would be a circumstance more or less indicative of fraud, according to others which accompanied or surrounded it; but the court could not assume that it was evidence so strong (unless explained) as should control the verdict of a jury. This was the view which was taken by the Circuit Judge.

It may, however, be remarked, that the possession of Coleman was perfectly consistent with the mortgage, at least up to the maturity of the mortgage debt, and the mortgagee instead of then attempting to oust him, might, as he did, have advertised and sold the premises. Fraud then cannot be predicated of the mortgagor's possession previous to the sale, and the only inquiry upon this point which could have arisen, is whether the continuance of the mortgagor's possession after Gunter's purchase affords evidence that the mortgage debt was simulated, or had been paid otherwise than by a devotion of the property to its satisfaction. It must be observed that Gunter does not claim under an absolute conveyance from Coleman, whether we regard the mortgage or consequent sale, so that it is difficult to perceive how the rule invoked by the counsel for the plaintiffs, even if applicable to real estate, can be applied, the more especially, as the action was instituted before the sale by the mortgagee. The questions considered are all that arise upon the record. If the plaintiffs had desired to present others, they should have prayed further instructions appropriate to the evidence—such as the effect of Coleman's possession of the slaves upon the *bona fides* of the transaction in respect to the premises in controversy, and upon the other points that have been discussed at the bar.

We have but to add, that the judgment of the Circuit Court is affirmed.

SARAH ANN McINTOSH ET AL. *vs.* ALEXANDER ET ALS.

1. A bill is multifarious, which unites a joint claim against several defendants, and a separate claim against one alone, with which the others have no connection.
2. The general rule is, that a demurrer for multifariousness, like a demurrer for a misjoinder at law, goes to the whole suit, and if sustained, the bill should be dismissed, and not made the ground of partial relief.
3. If there be cases in which an amendment should be allowed, after a demurrer for multifariousness is sustained to a bill, the application to amend must be made in the court below.

Error to the Chancery Court of Montgomery. Before the Hon. Jos. W. Lesesne, Chancellor.

The bill in this case was filed by the plaintiffs in error, and alleges that Elizabeth McIntosh, the mother of one, and the grand-mother of the other complainants, was possessed of a large personal estate, consisting of slaves, which in 1835, she devised by will to John McIntosh, deceased, then the husband of complainant, Sarah Ann McIntosh, and Florella Wright, her daughter; that the portion devised to John McIntosh was given to him for and during his natural life, and to the said Sarah Ann and her children after his death; that the slaves were divided between the said John McIntosh and the said Florella Wright, after the death of the testatrix; that Christopher H. Taylor sold to John McIntosh a tract of land in Marengo county, and induced the said John to execute a deed of trust on said slaves to Asa Robinson to secure the purchase money; that a short time after this, the said Taylor prevailed on the said John to deliver up to him the bond which he had executed for title to the said land; that John McIntosh was very intemperate, and from that cause was incapacitated, at the dates of these several transactions with Taylor, from attending to business, and was imposed upon and defrauded by Taylor; and that complainants, finding that the slaves were likely to be seized by said Robinson and sold under the deed of trust, removed them to Dale county, where Abram Warren and Benjamin Adams, combining with Taylor and Robinson, all of whom

had notice of the will, took possession of and removed a number of the slaves, and have sold or converted them to their own use. The bill also alleges, that one Asa Alexander, pretending friendship to said John McIntosh, likewise combined with Taylor, Robinson, Warren and Adams to obtain possession of other of the slaves and to sell and dispose of the same, so as to place them beyond the reach of complainants; and that subsequently the said Alexander executed to complainant Sarah Ann a paper, by which he covenanted to deliver to her certain of the slaves, but that he has since converted them to his own use, and refused to deliver them. The bill prays that Taylor, Robinson, Warren, Adams and Alexander be made defendants; that Taylor, Robinson, Warren and Adams be decreed to deliver up to complainants such of the slaves as they have in possession, and account for those they may have disposed of; and that Alexander be decreed to deliver up those named in the instrument executed by him to the complainant Sarah Ann, or to pay their value, &c. A decree *pro confesso* was taken against all the defendants except Alexander, who answered the bill and demurred to it for multifariousness. At the final hearing, the Chancellor sustained the demurrer, and dismissed the bill on that ground, which is now assigned as error.

T. & J. Williams, for plaintiffs in error:

1. The bill, seeking to subject the slaves under the will of Elizabeth McIntosh, and also under an express agreement and written covenant to deliver said slaves to complainant, the devisee in remainder under the will of E. McIntosh, is not multifarious. 12 Ala. N. S. 370, Heirs of Holman v. Bank of Norfolk; *vide* p. 409.

2. An agreement to surrender property to wife is good. Sledge, Exr. v. Clopton, 6 Ala. N. S. 589.

Belser & Harris, for defendants:

1. There is no equity in the bill. If there has been a conversion of the negroes by Alexander, the complainants have a clear and adequate remedy at law. They could sue Alexander for the money which he received for the negro sold, or maintain an action against him for disposing of the negro so as to defeat the remainder.

2. The bill is multifarious. It seeks to set aside a contract made between McIntosh and Taylor, for the sale of lands, on the ground that Taylor had no title to the lands and cheated McIntosh in the sale, and on the further ground that Alexander and the other defendants have converted the negroes to their own use; and prays that the said defendants account for the negroes which they have severally sold.

3. The bill is defective in its allegations, and does not on its face present a case on which the complainants are entitled to relief. It seeks to charge Alexander, on a written contract, to deliver certain negroes when he is paid certain sums of money. There is no allegation that the money has been paid to him, or of an offer to pay it.

DARGAN, J.—This bill is clearly multifarious. It charges a fraudulent combination between all the defendants in obtaining possession of the slaves, and prays that they deliver up such as they still have in their possession, and account for such as they have sold. It then sets out a contract by which Alexander alone undertook to deliver to Mrs. McIntosh certain slaves, which he has failed to do, and prays separate relief against him, that he deliver them up, or account for their value.

Where a joint claim against several defendants is united in the same bill with a separate claim against one defendant alone, with which the other defendants have no connection, the bill is multifarious. Story's Pl. § 284, p. 315; Boyd v. Hoyt, 5 Paige, 65. Here the bill seeks relief against all the defendants—first, for a joint tort, and then against Alexander alone, to enforce a contract with which the other defendants have no connection whatever.

The demurrer of Alexander was properly sustained. But as the other defendants did not answer the bill, and a decree *pro confesso* was taken against them, the question is presented, whether the bill should have been dismissed against all. The general rule is, that a demurrer for multifariousness, like a demurrer for a misjoinder at law, goes to the whole bill, and if sustained, the bill should be dismissed, and ought not to be made the foundation of partial relief. Gibbs v. Claggett, 2 Gill. & Johns. 14; Johnson v. Anthony, 2 Moloy, 373; Boyd v. Hoyt, 5 Paige, 65.

If there be cases in which an amendment should be allowed after a demurrer is sustained for multifariousness, certainly the application to amend should be made in the court below, and if not made there, it cannot be objected in the appellate court that the bill could be amended. I have not been able to find a case in which an amendment has been allowed after the demurrer was sustained, when the ground of demurrer was the improper joinder of distinct and separate grounds of equitable relief against several defendants, who were not in any manner connected with each other; and as this bill seeks relief against Alexander alone upon a contract, and against all the defendants for a joint tort, there was no error in dismissing the bill as to all. Let the decree be affirmed.

CHILTON, J.—I am of opinion, the bill should have been dismissed, so far as it seeks relief predicated upon the alleged contract between Mrs. McIntosh and Alexander, but not as to the other defendants, who submitted to the jurisdiction, and were in contempt for not answering. Besides, I see no good reason for departing from the practice, more than once indicated by the decisions of this court, of permitting the complainant, in cases like this, to dismiss as to the separate, and proceed as to the joint cause of action. Such amendments save cost and unnecessary delay, and I think are fully authorised by our peculiar mode of proceeding in uniting the demurrer with the answer, and by the liberality with which amendments are allowed by our statute. Dig. 351, § 37; Marriott & Hardesty v. Givens, 8 Ala. Rep. 694; Hunley v. Hunley, at the last term.

MURPHY, Trustee, &c., *vs.* THE BRANCH BANK AT MOBILE.

1. Parol evidence is inadmissible in a trial at law, to prove a consideration inconsistent with, or different from, that expressed in a deed.

Error to the Circuit Court of Monroe. Tried before the John Hon. Bragg.

This was a trial of the right of property in several slaves, levied on under an execution, in favor of the defendant in error, against Alonzo B. Dossey, and claimed by the plaintiff in error, as the trustee of Mary M. Dossey, wife of the said Alonzo B. The plaintiff in execution introduced proof of possession by said Alonzo B. of the slaves in controversy, at the time of the levy, and of their value. The claimant proved, that Mary M. Dossey is the daughter of one John Murphy, who was once the owner of certain slaves, which subsequently to the intermarriage of his daughter with Alonzo B. Dossey, he delivered to the latter, on condition, and on the promise of the said Alonzo B. that he would, in due time, convey them to a trustee, to be held for the sole and separate use of the said Mary M.: and that in compliance with this promise, the said Alonzo B. on the 8th day of March 1839, executed a deed for the slaves to the said John Murphy, for the use of the said Mary M. and her children, free from the control, &c., of the said Alonzo B. A copy of the the deed is found in the record, which recites that the said Alonzo B., "for and in consideration of his anxiety to provide for his said wife a competent support, in case of any future misfortune and embarrassment, and in and for the further consideration of one dollar, in hand paid, &c., hath bargained, sold," &c. This deed is signed by the said John Murphy and said Mary M. Dossey, also, and contains a provision that the trustee shall sell and dispose of the property, whenever requested so to do by the said Mary M. It was shown that John Murphy was dead, and that the claimant had been duly appointed trustee in his stead, and that the slave, Silva, named in the deed, had at the request of Mrs. Dossey been exchanged by him for Jane, one of those levied on, and that all the slaves levied on except one by the name of Emily, are the children of Jane.

The court charged the jury, that notwithstanding the circumstances under which the defendant in execution first acquired the possession of the slaves, and his undertaking to convey them to a trustee, to be held for the sole and separate use of his wife, the deed to John Murphy was wholly voluntary: to this charge the claimant excepted, and it is now assigned as error.

T. & J. Williams & Blount, for plaintiff in error:

1. The deed and bill of exceptions show that Dossey, the defendant in execution never had title to the property. The condition upon which he received it, negatives the idea of any interest in the property being given to him. It was placed in his possession for a specific purpose, which he performed, as a Court of Equity would have compelled him to have done, had he refused. Even where one receives a conveyance of property upon a verbal stipulation that he will dispose of it conditionally or absolutely, *for the benefit of another*, he will be compelled to fulfil his engagement. Harkins v. Coalter, 2 Porter, 463; Calhoun v. Cozzen, 3 Ala. Rep. 498; Lewis v. Hudson, 6 Ala. Rep. 463; Sledge's adm'rs. v. Clopton, 6 Ala. Rep. 589; Lamb v. Wragg & Stewart, 8 Porter, 72; Kennedy's heirs v. Kennedy, 2 Ala. Rep. 596; 7 Johns. Ch. Rep. 57. See 2d Johnson, 139, on parole promise.

2. The title to the property mentioned in the deed, vested in the trustee. In the absence of one duly appointed by the deed, a Court of Equity would regard the husband as such. Harkins v. Coalter, 2 Porter, 463, and a court of law is the proper forum to litigate *the legal title* with an adverse claimant. Colburn v. Broughton, 9 Ala. Rep. 363 and 364. Whenever the trust can be supported in equity, this court will consider the trustee entitled at law. Haslington v. Gill, 3 Term Reps. 620.

3. Where the wife has a separate estate in the slaves, and the husband and wife live together, the possession of the husband is the possession of the wife. Lee v. Mathews, 10 Ala. Rep. 682. The only evidence of title in the husband arose from the slaves being in his possession, and should have been refered to the deed, showing the legal title to the property to be in the trustee of Mrs. Dossey, without other proof of fraud beyond possession, which was accounted for in this case. The court should have instructed the jury that they could not find the property liable, &c, as set forth in the bill of exceptions. Tripp's ex'rs v. John, June Term, 1848.

4. Property purchased by the trustee, with funds constituting a portion of the separate estate of a married woman, is not subject for the debts of the husband. Browning v. Coppage, 3 Bibb Rep. 38; Quick v. Garrison, 10 Wend. 335 and 337;

Cadogan v Kennett, 2 Cowper's Rep. 432. So property exchanged for the trust estate, partakes of the nature of the trust, and the substituted property would not be liable to the debts of the husband. Jarman v. Woolston, 3 Term Rep. 618; Haslington v. Gill, 3 Term Rep. 620; Dean v. Brown, 12 Eng. Com. Law 30; Goddalt, v. Prentice, 17 Mass. 546.

5. Whether property passing from a parent to a child being a loan or gift, depends upon the intention of the donor, and it may be limited at the time of the delivery, to *a less estate*, than an absolute gift, and this by parole. Olds v. Powell, 7 Ala. Rep. 652.

6. Where, by a post nuptial settlement, property of the wife, be settled on her by the husband, such settlement being no more than what a court of chancery would order, the same is good against existing creditors of the husband. Wicks v. Clark, et als. 8 Paige, 161; 2 Story's Eq. Jur. 745, § 1377, 3d edit.; 1 Story's Eq. Jurisprudence, 375, § 372; 3d edit. It is insisted here that Dr. Dossey did, what under his promise to Gov. Murphy, a court of chancery would have compelled him to have done.

A. B. Cooper, for defendant in error:

1. The trustee and all the parties to the deed are estopped from denying that Dossey had not the entire estate in the property named in the deed. See 9 Wendell, 209; 4 Peters, 1; 6 Peters, 598.

2. That a trustee can only set up his legal estate, and cannot set up the secret arrangements and promises of the parties: That, claiming under the deed creating the trust, he cannot set up the equities of the parties.

3. That the deed was a voluntary deed, and must be treated as such; and if Jane, the slave levied upon, is not embraced in the deed, but was purchased or obtained by the trustee, there should be a deed of record to exempt her from creditors and purchasers.

DARGAN, J.—It is clear that the claimant and all the parties to the deed are estopped from denying that Dossey, the grantor, was the owner of the slaves, at the time the deed was executed. But as the deed conveyed the legal title to the

claimant, the question is, whether he can be permitted to show, by parol proof, that the deed was not voluntary, but was executed on a valuable consideration, which is not expressed in it. The consideration expressed in the deed is, the anxiety of the grantor to provide for his wife, and one dollar, in cash paid. The parol proof was, that the slaves belonged to John Murphy, the father of Mrs. Dossey, and were delivered to the husband, on the condition that he would convey them to a trustee, for the sole use of his wife, and that the deed was executed in pursuance of this trust. It is certainly established by the authorities refered to by the plaintiff, that on this evidence, a court of equity would have decreed the husband to convey the slaves, for the sole use of his wife, in pursuance of the trust on which he received them. Bishop's heirs v. Bishops heirs, 13 Ala. Rep. 475. And where one receives property upon a promise made by him to convey it in a particular manner, a court of equity will decree its conveyance in accordance with the promise. Kennedy's heirs v. Kennedy's heirs, 2 Ala. 596: Sledge's ad'rs v. Clopton, 6 Ala. 589. If, therefore, a bill had been filed to compel the execution of the trust assumed by Dossey, at the time the slaves were delivered to him, a court of equity would have been compelled to have decreed its execution, not only as against him, but also as against his creditors. The deed however, is silent as to this trust, which was created in favor Mrs. Dossey, by the delivery of the slaves to her husband, and we are now to determine whether this proof can be considered in a court of law, to show that the deed is not voluntary.

The general rule is too well established now to be shaken, that a consideration not expressed in a deed, and which is inconsistent with the consideration expressed cannot be shown by parol proof. 1 Greenl. Ev. §§ 285; Mead v. Steger, 5 Porter, 498; 5 Stewart and Porter, 410. If, however, there is no consideration expressed, proof may be received to show what the consideration was. 1 Vesey, 128; 15 Mass. Rep. 92. And it is said, if a deed mentions a consideration, and adds the words for other considerations, that proof may be received to show what those other considerations are. So if a monied consideration is expressed, proof may be received to show that the sum was greater or less than the amount ex-

pressed in the deed. But the authorities deny that parol proof can be received to establish a consideration wholly different from that expressed in the deed. Garrett v. Stewart, 1 McCord, 514; Starkie Ev. 1004; 5 Porter, 506; 1 Johns. Rep. 139. Here the deed sets out the consideration on which it purports to have been executed, to wit, the anxiety of the grantor, to provide for his wife, and one dollar, in cash paid. The proof would establish that the deed was executed in conformity with an undertaking entered into by Dossey, at the time the negroes were delivered to him. This is a consideration entirely different from that mentioned in the deed, and parol proof cannot be received to establish it, without violating the well settled rules of evidence.

At law, therefore, we must hold the deed voluntary, and if the rights of Mrs. Dossey can be protected, it must be done by an application to a court of chancery, to reform the deed and establish the trust created in her favor, at the time the slaves were delivered to her husband.

Let the judgment be affirmed.

MILLER ET AL. *vs.* SHACKELFORD.

1. In a proceeding by *scire facias* to revive a judgment, a plea that seeks to reach behind the judgment, or to set up a defence against the original cause of action, is bad on demurrer.
2. A *scire facias* to revive a judgment must set forth the ground on which the revival is sought, and if it omits to do so, it is fatally defective.

Error to the Circuit Court of Tuskaloosa. Tried before the Hon. Thomas A. Walker.

The facts are fully set out in the opinion of the court.

E. W. PECK, for the plaintiffs in error:

1. The plaintiffs in error were entitled to make any defence in this case, in the court below, that could have been made, if the action had been debt instead of *scire facias*. 1 Chitty's Pl. 481, 485.

2. If this action had been debt, founded upon a judgment of a sister State, it is clear, the defence made by the pleas must have prevailed. Pucket v. Pope, 3 N. S. 552, and cases cited. Is not the defence equally available on the present record?—The judgment, the foundation of this proceeding, has no higher legal effect, than it would be entitled to, if it had been rendered by a court of another State. Mills v. Duryee, 7 Cranch 483, 484. Consequently, what would be a defence in one case, must be so in the other.

3. The pleas utterly deny that the court ever acquired jurisdiction of the said John Miller, nor is this fact averred either in the *sci. fa.* or declaration. Now, if the record contained any thing that would have estopped the plaintiffs in error from interposing these pleas, it should have been replied. Pucket v. Pope, *supra.* But I contend, that even if the record recited that the said John Miller appeared, &c., it would not estop him from denying the want of jurisdiction in the court rendering the judgment. Sheernway et al. v. Stillman, 6 Wendell, 447, and cases cited. Harrad v. Barretto, jr. et al. 2 Hall's Sup. Ct. Rep. 302; Lucas v. The Bank of Darien, 2 Stew. 280; and Pucket v. Pope, *supra.*

4. If the defence was good for one of the plaintiffs in error, it was for both, for a judgment void as to one of the parties is so as to all. Hall v. Williams, 6 Pickering, 232. The defendant in error must have execution against both or neither of the parties.

5. The declaration and *sci. fa.* are both defective, because they do not aver that the plaintiff in the judgment had had no execution on the judgment—such averment is necessary. The averment that the judgment had not been paid, is not enough. The plaintiff in the judgment may have had execution against the bodies of the defendants in the judgment, and they may have been actually taken in execution, &c. Again, it does not appear that the plaintiff in the judgment might not have execution without *sci. fa.* 1 Littell, 164.

6. The *sci. fa.* and declaration are bad, because they do not show that execution might not issue without revivor. They should show that a revivor is necessary. Dig. 206, §§ 28, 29; Dozier v. Gore, 1 Littell's Rep. 164; Gill v. Scrivens, 7 Term Rep. 27.

ORMOND and MOODY, for the defendant:

This is not a new suit, but a *scire facias* to have execution of a judgment. Upon a recognisance, a *scire facias* is an original proceeding; but upon a judgment, it is only a continuation of the former suit. Tidd's Pr. 983; 7 Vermont Rep. 54; Pirtle's Dig. 370. A *scire facias*, to revive a judgment, is only a continuation of the former suit, and is not an original proceeding. 4 Hammond's (Ohio) Rep. 398. The law presumes the judgment is in some way arranged in a year, and will not suffer an execution to go. A *scire facias* is issued for the debtor to show cause why execution should not issue; and if no cause is shown, judgment passes that the plaintiff have execution *on the former judgment*. When brought to revive a judgment, after a year and a day, it is but a continuation of the original action. 7 Vermont Rep. 53-4; 3 U. S. Dig. 387; 2 Arch. Pr. 76. The judgment in this case is not that "the plaintiff recover, &c.," but that he "have execution of the judgment."

A court will not hear a party contradict its own record—the record is conclusive. A plea contradicting the record, or denying the validity of a judgment, admitting it to exist, is bad on its face, and may be stricken out, or demurred to. The *sci. fa.* called on the defendants, not to contest the validity of the judgment, but to show cause why it may not be executed, as that it has been paid, or otherwise arranged. But the pleas alleging that John Miller was not served with process, assail the judgment, and avowedly on their face contradict the record. They cannot be entertained at all. If a party has not been served with process, or the writ has been served on another of the same name, he is not without remedy. Givins v. Tidmore, 8 Ala. Rep. 745.

No one of the four *sci. fas.* in this case was executed on John Miller—all being returned, as to him, "not found." But he voluntarily comes into court, and attempts to prevent the execution of the judgment, alleging that the original writ was not served on him. If it be true that the writ was not executed on him, then plaintiff has no judgment against him; let him stand aside; he has no right to interfere between the plaintiff and the real defendants in the judgment, who were served with process, and appeared and defended the suit. It will be

time enough for him to speak, when an attempt is made to levy on his property, or to sue him in Mississippi, where he now resides.

As to the pretended agreement, *that* is dated in 1826. The judgment was rendered in 1827; it is conclusive upon all pre-existing matters of defence. In *no case*, nor under any circumstances, can the merits of the original judgment be inquired into for the purpose of furnishing a defence to a *scire facias*. In this proceeding, the defendant must deny the original judgment altogether, or show it has been satisfied since it was rendered; for down to that point of time, it is conclusive. 5 Serg. and Rawle, 68-9; 8 Johnson's R. 61; 1 Binney's R. 291; 1 Cro. Eliz. 588; Pirtle's Dig. 370.

CHILTON, J.—This was a proceeding by *scire facias* to revive a judgment rendered in the Circuit Court of Tuskaloosa county, in March 1827, against the plaintiffs in error. Neither the *sci. fa.* nor declaration filed thereon set forth any reason why the aid of the court is invoked, but merely state the amount and date of the judgment, and that it is in full force and unpaid. The defendants appeared, and said John Miller pleaded separately, as well as jointly with said George, the following pleas, to which demurrers were sustained, viz: 1. That the plaintiff ought not to have execution upon his judgment, because, before the commencement of the action on which the judgment was rendered, and from thence until after the rendition of said judgment, he was a resident and citizen of the State of South Carolina, and not of the State of Alabama, and that no process whatsoever was served on him in said action, either upon his person or his property, nor did this court acquire jurisdiction of said defendant in said action by attachment, garnishment, or in any other manner whatsoever; that he did not appear in said action, or defend, either by himself or his counsel, and so he says, the judgment as to him is null and void. 2. The second plea alleges that the plaintiff, anterior to the judgment now sought to be revived, agreed under seal to release and discharge the defendant from the debt, in consideration that he would assign over to plaintiff notes and accounts equal in amount to one half of said demand, with which agreement the defendant complied, &c. Upon

the other pleas of payment and the statute of limitations, issues were joined, and a judgment was rendered for the plaintiff below.

The pleas in this case we regard as manifestly bad. The first calls upon the court to re-examine its own judgment rendered some twenty years previously, and to ascertain whether the record does not falsely certify that the defendant was before the court. Where a year and a day have elapsed after judgment, without the issuance of execution, the law presumes that the judgment has been executed, or that the plaintiff has released the execution; hence the party is required, before he can proceed on his judgment, to revive by *scire facias*. Clay's Dig. 207, § 29. Under the statute of Westminster 2, (13 Edw. 1,) c. 45, authorising a similar revival of judgments, where no execution had issued within a year and a day, the proceeding by *scire facias quare executionem non*, is regarded as interlocutory, and in the nature of process, being but a continuation of the original proceedings in the cause, (2 Archb. Pr. 76); and it is a rule of very general, if not of universal application, that the defendant can plead no matter to the *scire facias* which he could have pleaded in the original action. 2 Tidd's Pr. 1130; Cro. Eliz. 283; 1 Salk. 2; 2 Stra. 1043; McFarlain v. Irwin, 8 Johns. R. 77. In such case, the party may plead *nul tiel* record, payment, release, or that the judgment has been levied on a *fieri facias*, or that his lands have been extended upon an elegit. He is not permitted, however, to gainsay the judgment, even though it was confessed on warrant of attorney, which was without consideration. See McFarlain v. Irwin, *supra*, and cases there cited; also, Greene v. Onington, 16 Johns. Rep. 55; Griswald v. Stewart, 4 Cow. Rep. 457; Hatch v. Eustis, 1 Gallis. C. C. Rep. 160.

If the sheriff has made a false return upon the process in the original cause, he is liable in damages for the injury; and if, under such circumstances, an iniquitous judgment is attempted to be enforced, a court of equity would afford the defendant effectual relief. Givens v. Tidmore, 8 Ala. Rep. 745, and cases there cited.

But although the pleas demurred to were evidently bad, yet upon the principle that the demurrer reaches back to the faulty pleading of the party demurring, the *sci. fa.* in our opinion was

defective, and must fall with them. The plaintiff, to entitle himself to the writ, must bring himself within the provisions of the statute authorising its issuance. The *sci. fa.* should set forth the grounds upon which it seeks the aid of the court; it is not every unsatisfied judgment which may be made the foundation for such writ, but it is only lawful, in the language of the statute, for the plaintiff to have said writ when no execution shall have issued on the judgment within a year and a day after its rendition. Dig. 207, § 29. *Non liquet*, but the court is called upon to do an useless thing—to order and adjudge that the plaintiff have execution of his judgment upon the *sci. fa.* when he has the full benefit of execution without it. That a party would not be likely to resort to such writ unnecessarily, is no answer to the general rule of law, that every party, who petitions the court to become active in his behalf, must show, *prima facie* at least, that he is entitled to the relief which he seeks, or some relief consistent with his pleadings. As to requisites of *scire facias*, see 2 Ohio Rep. 248; 5 Halst. Rep. 337; 2 Kinney's Comp. 559. The *scire facias* and declaration being fatally defective in failing to set out or allege the existence of any ground which would authorise the writ to issue, the judgment must be reversed. See Gill v. Scrivens, 7 T. R. 30; Dozier v. Gore, 1 Litt. Rep. 164; as to forms of the writ, see Tidd's Forms, 449, §§ 31–39; 2 Harris' Ent. 460, § 132. Let the cause be remanded, that the plaintiff below have leave to amend, if the record shows he has had no execution of the judgment. Patrick v. Wood, 3 Bibb, 232; 2 Taylor, 146.

JENKINS *vs.* GRAY ET AL.

1. A return of no property, on an execution issued against the administrator of a deceased executor, upon final settlement of his intestate's administration, will not authorise the issuance of execution against the securities of the executor.

Error to the Orphans' Court of Lawrence. Tried before the Hon. Wm. M. Gallaway, Judge.

This was a motion by the defendants in error to quash an

execution issued from the Orphans' Court of Lawrence, in favor of the plaintiff in error. The facts are sufficiently set out in the opinion of the court. The Judge of the Orphans' Court sustained the motion, and the same is now assigned as error.

T. M. PETERS, with whom was L. P. WALKER, for plaintiff:

1. The decrees of distribution against Gallaway, administrator of Jennings, late executor of Jenkins, being regular, and the *fi. fa's* issued thereon having a sufficient judgment to support them, upon their return by the sheriff, "no property found," it was both proper and legal, that execution should issue "forthwith" against the sureties, Gray and Anderson. This was done, and the fi. fa's were irregularly quashed. Clay's Dig. 305, § 45; Clark v. West, 5 Ala. Rep. 117; Cawthorn v. Knight, 11 Ala. Rep. 579; 1 Archb. Pr. 292.

2. The statutes of 1845 and 1832, are remedial acts, and there is nothing in them forbidding the use of the remedy thus given against the sureties, after the death of the principal, as well as during his life: it is true, doubtless, that the remedy might not lie against an *administrator*, unless expressly given; but in this case, there is no administrator concerned, except Gallaway, and against him it is given by the act of 1845. Remedial statutes should be liberally construed, but in this case, the aid of construction is not required, because the language of the statute of 1832, is as broad as it can be. It comprehends *all* cases, "whenever any execution shall have issued on *any* decree made by the Orphans' Court and final settlement of executors" &c., and is "returned by the sheriff no property found"—thereupon "execution may and *shall* forthwith issue against the securities" of such executor, &c. And the statute of 1845, places *the administrator of an administrator or executor* precisely in such deceased administrator or executor's position in *all* respects, and hence it gives *execution* against *him* "on the decree" and final settlement. The act of 1845, brings distributees and creditors within the relief and remedies provided by the act of 1832. The *fact* then that the bond was made *before* the statutes of 1832, and 1845, or that the principal died before their enactment, or before the final settlement of September 1846, and decrees thereon, avails nothing. 6 Bacon's Abr. 389; 1 Black. Com. 88, n. 30; Dwarris,

718, 735; Aldridge v. T. C. & D. Rail Road, 2 Stewart and Porter, 199; Acts of 1845, 166, 167; Elliott and Perkins v. Mayfield and wife, 4 Ala. Rep. 417; Clay's Dig. 305, § 45; 5 Ala. Rep. 117; 11 Ala. Rep. 579.

3. In this mode of proceeding, the securities cannot impeach the regularity of the decrees of distribution against the administrator of the executor; for the settlement of the principal, or his representative, if he act without fraud, concludes them. Williamson v. Howel, 4 Ala. Rep. 693; 4 ib. 607; 5 Ala. Rep. 117; Wayman v. Campbell, 6 Porter, 219; McBroom v. Sommerville, 2 Stewart Rep. 515; McClure, et al. v. Colclough, et al, 5 Ala. Rep. 65.

4. The proceedings antecedent to the decrees of distribution, and the decrees of distribution upon the final settlement of September 1846, are regular, and in conformity with law; so also are the subsequent steps taken to bind the sureties, and as publication of notice of final settlement brought all the parties before court entitled to be there, or having a right to complain of what was done, and among others, the *sureties* themselves might have come and superintended the final settlement, it is now too late, in this way, to complain of the consequences of the decrees then rendered. Clay's Dig. 229, §§ 41, 42; ib. 303, 304, 305, §'s 31, 42, 43, 44, 45; Horn v. Grayson, 7 Porter, 270; Brazeale v. Brazeale, 9 Ala. Rep. 491; Steel v. Knox, 10 Ala. Rep. 608; 11 Ala. Rep. 872; 11 ib. 104; Carroll v. Moore, adm'r 7 Ala. Rep. 615; 2 Archb. Pr. 148; ib. Forms, 499.

Wm. Cooper, for the defendants:

1. Until the act of 1845, page in pamphlet acts, 167, the county court had no power to call an administrator of an administrator or executor, &c., to a settlement of the estate of the first testator or intestate, to whom his intestate was immediate representative, hence the act of 1845. As a matter of course then, such a case as is now made, could not possibly have existed under the act of 1832. Clay's Dig. 304, '5, § 42, 45.

2. The question then arises *whether under the act of* 1845, any provision or power is given to the county court to issue executions against the securities on a return of *nulla bona*, as

to the executor or administrator. We contend there is no such power any where given, nor any rule whatever that could possibly sanction such a course. It has been decided again and again, that *at law*, no proceedings could be had against the administrator of an administrator touching the estate first administered on. See 3 Ala. Rep. 670, Taliaferro v. Bassett. There too it is questioned whether the sureties of the first administrator, are liable for assets in specie which pass at the administrators death, into the hands of his successor. There too, the court expressly decided, page 675, 3 Ala. Rep., that when there was no remedy expressly given to issue *fi fa.* at law, resort must *alone* be had in equity. Again, to show that before the act of 1845, the county judge could not *even call on the administrator of an administrator* or guardian to settle the official trusts of the deceased guardian or administrator, see 8 Ala. Rep. 655, Snedicor v. Carnes. There too, the court say that the county court has no other power *than that given by statute*, and also, that before 1845, the statutes were defective in giving the powers, and we insist that the statutes are yet defective, and have never given the power contended for by the plaintiff in error to issue *fi fa.* on return of *nulla bona* on the decree had *in final settlement* of an *administrator of an administrator*, on first estate; and that it is requisite that such power should be given by statute, I refer to the fact, that the act 1832, *gave that power when a judgment was had against first administrator* and went no further. The decisions refered to, also support my views on this point. 11 Ala. Rep. 579, Cawthorn v. Knight, does not at all conflict with my position, but does sustain me. In this case, the execution was unauthorized, there being neither *judgment* nor *statute* to sustain it. Under this state of the case, the remedy was to quash, and so the judgment in the court below is sustained by the books. 3 Ala. Rep. 653, Crenshaw v. Hardy; 5 Ala. Rep. 188, VanCleave v. Hayworth.

DARGAN, J.—Augustine Jenkins, in April 1822, executed his last will and testament, by which he appointed William Jennings his executor. In May 1823, the testator having departed this life, the will was admitted to probate in the Orphans' Court of Lawrence, and letters testamentary issued to

William Jennings, he having given bond in the sum of six thousand dollars, with Gray and Anderson as his securities. In 1825, Jennings died, without having made a settlement of his accounts as executor. Letters of administration, with the will annexed, on the estate of Jenkins were granted to another, but it does not appear, that there was any representation of the estate of Jennings, the executor, until the year 1846, when Gallaway, the sheriff of Lawrence county, was appointed administrator by virtue of his office. The estate of Jennings was declared insolvent, and on the application of Gallaway, a final settlement of the administration of Wm. Jennings was made, and a decree rendered against Gallaway, the administrator, for eight thousand one hundred and fifty-nine 93-100 dollars, being the amount of the assets received by Jennings, the executor, and wasted or not accounted for by him. There being three legatees entitled to this sum, it was divided into three equal parts, and a separate decree rendered in favor of each for his share or proportion. Executions were issued on these decrees, which being returned, no property, executions were issued against the securities of Jennings, the executor. The securities moved to quash the executions, on the ground that they were issued against them without authority of law. The motion was granted, and from the judgment quashing the executions, a writ of error is brought to this court.

Previous to the Act of the 27th January 1845, the Orphans' Court had no jurisdiction to compel the representative of a deceased executor, or administrator, to settle the accounts between the deceased executor or administrator and the estate which he represented; and if the deceased executor or administrator had committed a devastavit, or converted the goods of his decedent to his own use, the parties, whose rights were affected thereby, were compelled to resort to a court of equity for relief, to charge the estate of the deceased executor or administrator with the waste. Taliaferro v. Bassett, 3 Ala. Rep. 670; Snedicor v. Carnes, 8 Ala. Rep. 655. To remedy this defect in the powers and jurisdiction of the Orphans' Court, the act alluded to was passed, which confers jurisdiction on the Orphans' Court, to compel an administrator or executor of a deceased administrator or executor to account for effects which

had been received by such deceased executor or administrator, and wasted or not accounted for by him. But as to the mode in which the decree that may be rendered on taking the account shall be enforced, the Act of 1845 is entirely silent, and the question is, can an execution issue against the securities of the deceased administrator or executor, after an execution on such decree against the administrator or executor of the deceased administrator or executor is returned, no property found.

By the Act of 1830, (Clay's Digest, 304, 305,) all final decrees against an executor or administrator, or guardian, are declared to have the force and effect of judgments, on which executions may issue, and by the Act of 1832, (Clay's Digest, 305) upon the return of the execution, no property found, execution may issue against the securities of such executor, &c. The language of this Act is, "whenever any execution shall have issued on any decree made by the Orphans' Court on final settlement of the accounts of executors, administrators or guardians, and is returned no property found generally, *or as to a part thereof*, execution may, and shall, forthwith issue against the securities of such executor, administrator or guardian." It is very clear that the securities against whom execution can issue, on the return of no property, are the securities of the executor, administrator, or guardian, against whom the decree is rendered, and execution cannot be issued against the securities of a deceased executor, administrator, or guardian against whom no decree is rendered. Before the Act of 1845, no one would contend that the securities of Jennings were liable to this summary remedy, because, until the passage of this Act, the Orphans' Court had not jurisdiction to compel the representative of Jennings to settle the accounts between him and the estate of his testator. This Act, however, gives this jurisdiction to the Orphans' Court, but does not prescribe how the securities of the deceased executor, administrator or guardian, shall be made responsible *for the devastavit;* consequently neither the Act of 1832, nor of 1845, subjects the securities to this summary remedy. The execution was therefore issued without authority of law, and was properly quashed.

Let the judgment be affirmed.

EXECUTORS OF ROBERTSON *vs.* ALLEN.

1. If a subscribing witness to an instrument becomes incompetent from interest, without the fault or agency of the party who claims under it, secondary evidence is admissible to prove its execution.
2. It is not necessary, that a party should introduce a subscribing witness to an instrument, who is incompetent to testify, and give the opposite party an opportunity of waiving all objection to his competency, before he is allowed to prove its execution by other testimony.
3. A legatee under a will is *prima facie* an incompetent witness for the executors in a suit against them, for money alleged to have been due by the testator.
4. Although a written instrument may contain the highest evidence of a witness' interest, it is not indispensably necessary to produce it.—The proof may be made by the witness himself on *voir dire*, or by any other person who is able to testify to the fact.
5. Where an error is shown to have been committed by the primary court, the presumption is that it worked an injury to the party complaining; and the judgment must consequently be reversed, unless it satisfactorily appears that no injury could have ensued.

Error to the Circuit Court of St. Clair. Tried before the Hon. Thomas A. Walker.

Assumpsit by the defendant against the plaintiffs in error, as executors of John Robertson, deceased. The plaintiff offered proof tending to show, that the testator of the defendants, between the first and tenth days of September 1840, promised the plaintiff to pay him two hundred dollars, if he would give up a negro girl, named Mary, then, and before that time in the possession of the plaintiff, and to which he laid claim as a gift from said testator, of whom he was the son-in-law; and that said girl about that time went into the testator's possession. The defennant then, after proving by one Collins the signature of the subscribing witness, and that said subscribing witness was a son of the testator and a legatee under his will, offered to read to the jury, a bill of sale from the plaintiff to said testator for the girl Mary, dated the 28th of August 1840. The plaintiff's counsel objected to the introduction of the bill of sale, because it had not been proven by the subscribing witness, and proposed to waive all objection to his compe-

tency, and it being made to appear, that the subscribing witness resided in the county, the court excluded the bill of sale from the jury, and the defendant excepted. The ruling of the court is the error now assigned.

POPE, for plaintiffs in error:

RICE, for defendant.

DARGAN, J.—If a subscribing witness to a written instrument become afterwards interested, he is incompetent to testify in support of his own interest; and if his interest is acquired, without the agency or fault of the party who wishes to establish the execution of the instrument, he may resort to other evidence, than the testimony of the subscribing witness. Greenl. Ev. 607; Howel v. Stevenson, 15 Com. Law Rep. 516; Cowen & Hill's notes to Phil. Ev. vol. 3, note 894.

It cannot be necessary that a party should call a witness who is incompetent to testify, nor be at the expense of having him subpœnaed. If the opposite party wishes to examine him against his interest it is his duty to have him subpœnaed, but it would answer no purpose to compel the party to produce the witness when he has not the legal right to examine him. If therefore, the witness to the bill of sale, had become interested subsequent to its execution, the defendant who desired to prove its execution, should have been permitted to do so, by calling witnesses to prove the hand writing, and he was not bound to offer first the subscribing witness, to ascertain whether the plaintiff would object to him or not.

The suit was brought against the executors of John Robertson, the witness to the bill of sale was his son, and a legatee under his will, and we think it very clear, that he was *prima facie* incompetent to testify in behalf of the executors, for, whether he was a specific, a pecuniary, or a residuary legatee, he has an interest in creating a fund for the payment of the debts, that his legacy may be received without abatement. It is true, that under some circumstances, a legatee under a will might not be incompetent or interested; for instance, if the suit was by the executors to recover a debt due the estate, and there were no debts outstanding against the estate, a legatee who was entitled, under the will, to a speci-

fic chattel, and whose interest could not be affected by the result of the suit, might be a competent witness for the executor. But when the suit is for a sum of money against the executors, that the witness is a legatee under the will, raises the presumption of interest, and renders him incompetent.

But it is contended, that his interest could not be made to appear without the production of the will itself. This we do not understand to be the rule. Testimony to prove or disprove a witness to be interested is always addressed to the court, and, although the interest of a witness may be made to appear by a written instrument, I do not understand that it is indispensably necessary to produce the written instrument, but his interest may be shown either by his own testimony on *voir dire*, or by any other person who can testify to his interest, and who knows that he is to be benefitted or injured by the result of the suit. Indeed it would often lead to great injustice if a party was bound to produce the highest evidence of the interest of the witness. The deed or instrument in writing may not be in the power of the party objecting to the competency of the witness, or he may not have known that he would be offered, and to hold that the instrument creating his interest must be produced, would often compel parties to submit to illegal proof. 5 Con. Rep. 258; 7 Greenl. 51; 1 Gill. & John. 366.

But it is said, that the bill of sale, which the defendant was endeavoring to prove, was irrelevant, and therefore, that there was no error in rejecting it. It must be borne in mind that the court rejected the evidence offered to its execution, and no question was raised in the court below, whether it was relevant testimony or not. As the party was precluded from offering the bill of sale as evidence, by the ruling of the court, in rejecting the testimony introduced to prove its execution, no question in reference to its relevancy, was decided by the court below, and if we were to hold that the error committed could be cured, by deciding in this court another question that was not raised in the court below we might do the plaintiff in error great injustice. The correct rule, we think, is this, when an error is shown to exist, the presumption is, that the party complaining has been injured by it, and we must reverse the judgment, unless it satisfactorily appears that no in-

jury could have resulted from it. The court erred in rejecting the testimony offered to prove the execution of the bill of sale, and we cannot presume that it would not have been relevant proof, if it had been permitted to be offered to the jury, but on the contrary, we must presume, that the defendant could have shown it to be relevant, had he been permitted to prove its execution.

The judgment must be reversed, and the cause remanded.

WHITE, Survivor, &c. of Hardie, *vs.* YARBROUGH.

1. A plea, which professes to answer the whole, but which, in fact, answers only a part of the cause of action, leaving the remainder unanswered, is bad on demurrer.
2. It is no defence to an action on a promissory note, that a part of its consideration consisted of a sum of money, advanced by one of the payees to a third person, at the request of the maker, in payment of an illegal wager, which such third person had won from the maker.

Error to the Circuit Court of Talladega. Tried before the Hon. Nathan Cook.

This was an action of debt on a bill single by defendant against the plaintiff in error. The defendant below filed the following plea to the plaintiff's declaration: "And the defendant, by attorney, comes and defends, &c., and says, the said plaintiff ought not to have or maintain his action, because, he says, in the year 1844, the said defendant betted with one B. H. Spyker the sum of one hundred dollars upon the result of the then pending Presidential election, for President of the United States, which said bet of one hundred dollars was won by said B. H. Spyker from defendant, and John Hardie, the active member of the firm of John Hardie & Co., plaintiffs in this suit, at the request of defendant, paid to said Spyker the said sum of one hundred dollars, won by said Spyker as aforesaid from defendant, by delivering to Spyker goods to the amount of one hundred dollars, well knowing at the time of the delivery of said goods, that said Spyker had won said one

hundred dollars from defendant as aforesaid, and that said goods were delivered to said Spyker in payment of the same, and the goods, so delivered to said Spyker, for the purpose aforesaid, constituted to that extent the consideration of the note sued on; and this, said defendant is ready to verify."—To this plea, the plaintiff demurred, and the demurrer was sustained by the court, which is now assigned as error.

WOODWARD, for plaintiff in error:

The plea is good. A contract in furtherance of an act in violation of statute, is void. Chitty on Con. 232.

A wager on an election is void, as against public policy.—Chitty's Con. 156. It was so decided, also, in 9 Cowen, §169. See Chitty on Con. 156, note on right hand page.

The payment of goods was in furtherance of the illegal act, and therefore the note cannot be recovered—a part of the consideration being this void transaction, which vitiates the whole. Chitty on Con. 181-2, 228; 4 Taunt. 165.

RICE and MORGAN, for defendant:

1. The plea is fatally defective; it proposes to answer the whole declaration, *when it only answers a part.* Deshler v. Hodges, use, &c., 3 Ala. R. 509.

2. The substance of the plea is bad. It avers, that at the request of the defendant, the plaintiff's copartner paid one Spyker one hundred dollars, which Spyker had won on a bet made on the Presidential election, and for which sum, so paid, the defendant gave his note, &c. From the plea, it does not appear that the plaintiff's partner had anything to do with the bet; but after it was made and lost by defendant, Hardie paid Spyker, at the request of defendant. Hardie was not a stakeholder; he furnished goods merely, not to be bet, but to pay a bet that defendant had made and lost.

COLLIER, C. J.—The defendant's plea professes to answer the entire cause of action, but if it answers any, it is a part only, leaving unanswered much the greater part, which is of the gist of the action, and we should incline to think it bad on demurrer. Deshler v. Hodges, use, &c., 3 Ala. Rep. 509. If, however, the plea in this respect be free from objection, we cannot doubt that the matter of the defence which it relies on

is wholly unavailable. It amounts to nothing more than this, that the defendant lost one hundred dollars upon the result of the Presidential election of 1844, which was won by Spyker; that the defendant requested John Hardie, the active partner of the firm of which the plaintiff was a member, to pay Spyker the amount lost, in goods; the goods were accordingly delivered, though Hardie well knew at the time they were intended to pay Spyker the bet he had won. It is quite enough to recite the plea, to show that the demurrer to it was properly sustained. The judgment is consequently affirmed.

THE EXECUTORS OF SMITH *vs.* HOUSTON, USE, &c.

1. The fact, that B. is the usee in the suit, does not render a deed, executed by him as sheriff, before the institution of the suit, inadmissible in evidence to shew title in the plaintiff.
2. A sheriff's deed for land, sold under judgment and execution, cannot be collaterally impeached by a stranger, who has no interest in either.
3. Assumpsit for use and occupation will lie against one who takes possession of vacant land, admitting that he has no title, and expressing a willingness to pay rent to the rightful owner; but possession by a naked trespasser is not of itself sufficient to sustain the action. (Davidson v. Ernest, 7 Ala. 817, commented on and approved.)
4. A plaintiff in assumpsit for use and occupation cannot recover rent, that has accrued before the execution and delivery of the deed under which he claims title.

Error to the Circuit Court of Lauderdale. Tried before the Hon. Sidney C. Posey.

ASSUMPSIT for rent of land, instituted by defendant in error, for the use of Benham against Henry Smith, and after his death revived against the plaintiffs in error as his executors. The plaintiff in the court below purchased the land on the 3d October 1842, at a sale made by said Benham, as sheriff of Lauderdale county, under judgment and execution against one Dillahunty, and offered to read to the jury the deed of the said sheriff, bearing date the 23d July 1844. The defendants objected to the deed going to the jury on the ground, that

Benham being the usee in the suit, it was allowing him to make evidence for himself, but the court overruled the objection, and permitted the deed to be read. The plaintiff proved that said Smith occupied a part of the said land in 1844, and expressed his willingness to pay a fair rent for it, if he could find the true owner, and that at an interview with Benham in 1845, he offered him a set of mill stones, in part payment of the rent. He also proved the value of the rent. The defendants offered to introduce evidence tending to impeach the bona fides of the deed from Benham to the plaintiff, but the court rejected it. These are all the facts necessary to an understanding of the case.

The court charged the jury, that the title was in Houston, by virtue of the deed, and that it was not necessary to prove, either an express or implied agreement, on the part of Smith, to occupy the land under him further than the law implied it, from the fact of Houston's title: and to enable Smith to resist the recovery in this action, they must believe that Smith held adversely either in his own right, or under title from another.

The defendants asked the court to charge the jury, that if the proof shows that Houston's deed bears date the 23d July 1844, and that Smith went into the possession on the 1st January 1844, Houston's right could not relate back so as to give him a title from the time Smith took possession of the land, which charge the court refused to give.

To the several rulings of the court, to the charge given, and the refusal to charge as requested, the defendants excepted and now assign them severally as error.

L. P. Walker, for plaintiffs in error:

1. It seems to me to be clear that Benham, for whose use the suit was brought, could not use the deed executed by himself to Houston, as evidence in his favor, the more especially as it was dated after Smith's occupancy commenced—for this would be making evidence for himself.

2. It has always been understood, that even in a court of law, you may impeach a deed for fraud in its execution. But in effect, the court below, ruled against this doctrine, as is shown by bill of exceptions.

3. To entitle the plaintiff to the action for use and occupa-

tion, the tenant must have the *right* of occupying and using the premises. Crabb's Law of Real Pro. Law Lib. for Oct. 1846, p. 184, note, 1; 3 Wendell, 219.

4. This action is founded on *contract*, and does not apply to an adverse *tortious* holding. Law Lib. Oct. 1846, p. 185; 10 Ala. Rep. 248. Because that would be to determine the title to the land in an action of assumpsit. 11 Pick. Rep. 9.

5. There must either be an express promise which is evidence of *tenancy*, to which case the action is confined, or an *entry by consent* of the landlord, from which a tenancy is implied. Crabb's Law Real Pro. 185, note 4.

6. Where the premises have been occupied without the consent of the owner, the state of landlord and tenant does not exist, and an action for use and occupation cannot be sustained. Curtis v. Treat, 21 Maine Rep. 525. The case of Davidson v. Ernest, 7 Ala. 818, does not affect this case upon the facts.

KENNEDY, for defendant made the following points:

1. An action of assumpsit for use and occupation will lie to recover the value of the rent of land, upon an implied promise. Davidson v. Ernest, 7 Ala. 817.

2. A deed given by a sheriff upon a previous sale on execution relates back, and in judgment of law is executed at the time of sale. Jackson, *ex dem.* &c. v. Ramsay, 3 Cow. 75.

3. A sheriff's deed cannot be impeached on a collateral issue, except for fraud in its execution. Love & Williams v. Powell, 5 Ala. 58; Ware v. Bradford, 2 Ala. 676.

DARGAN, J.—The deed of the sheriff to Houston was properly admitted as evidence to show the title in him, notwithstanding the suit is brought for the use of Benham, who, as sheriff, executed the deed. Because the suit is for the use of Benham, the deed, which is the evidence of Houston's title, does not become illegal testimony, nor is its effect as proof destroyed or impaired.

Nor is there any error in the rejection of the evidence offered by the defendants below for the purpose of impeaching the deed for fraud. The land, previous to the sale by the sheriff, belonged to Dillahunty. Smith, the defendant, had

no interest either in the land or in the judgments under which it was sold, but was an entire stranger, without any interest in the subject matter of the deed. The parties in interest seem to be content with the transaction, and it is certainly incompetent for a mere stranger, without interest in the subject matter of the deed, to impeach it for fraud, even if it were permissible for the defendant in the judgment to do so, when the deed is introduced collaterally as evidence of title.

But we think the charge of the court as given, was too broad: It is in the following language, "that the title was in Houston by virtue of the deed, and it was not necessary to prove an express or implied agreement on the part of Smith, to occupy the land under him, further than the law implied it from the fact of title in Houston, and to enable Smith to resist a recovery in this action, they must believe, that Smith held the land adversely either in his own right, or under the title of another." It is true, that to enable a plaintiff to recover it, it is not necessary to show that the technical relation of landland and tenant existed between the plaintiff and defendaut during the occupancy. In the case of Davidson v. Ernest, 7 Ala. Rep. 817, the facts were, that Davidson entered into a verbal contract with Ernest, for the purchase of the land, and by virtue of this contract entered into possession, and occupied the land for two years and then abandoeed it, and refused to consummate the contract. Ernest brought assumpsit for use and occupation, and this court held that the action could be maintained, although there was no proof of any actual agreement to pay rent. I am aware that this decision is opposed to several decisions of the different States. But it is in accordance with the case of Hull v. Vaughan, 6 Price' Exchequer Rep. in which it was held, under a precisely similar state of facts, that the action could be maintained. Indeed, if assumpsit for use and occupation would not lie, we do not see that the plaintiff could have any legal remedy, for it is very clear that the possession of the defendant was not tortious. He entered with the consent of the plaintiff, and in pursuance of the terms of a verbal contract, and notwithstanding the case of Smith v. Stewart, 6 Johns. 46, and other decisions, we do not think he could be considered as a trespasser. The case therefore, in 7 Ala. Rep. accords with the principles of justice and allows

a remedy for a wrong, which would be without remedy, if we were to repudiate that decision. Although under the authority of this case, an action of assumpsit for use and occupation may be sustained, though the relation of landlord and tenant be not shown to have existed during the occupancy, yet in the absence of proof of that relation, the character of the possession becomes a material inquiry, and if the possession was tortious and the defendant a naked possessor, asserting no title, nor claiming to have entered under any, assumpsit for use and occupation cannot be sustained. Ryan v. Marsh, 2 N. & M. 156; 3 S. & R. 500; 2 Gill & Johns. 326; 6 N. Hamp. 298; 10 Gill & Johns. 149. But we should hold that assumpsit would lie against one, who, finding land vacant, took possession and admitted that he had no title, and was willing to pay rent to the owner. This would afford evidence, that the defendant considered his possession subordinate to the title of the rightful owner, *and of his consent to pay rent*, and if the defendant so considered his possession, and was willing to pay rent, we can perceive no reason why the owner may not look upon the character of his possession in the same manner, even if he did not know of defendant's possession, when it commenced, or even when it terminated. It is probable that from the evidence, the jury would have come to the conclusion that this was the true state of the facts of this case. But the charge of the court rendered it unnecessary for them to consider of the evidence tending to prove these facts, and assumed as a legal conclusion, that proof of title alone, if the defendant did not hold adversely under a claim of title, was sufficient to maintain this action. If this charge as a legal proposition is correct, it would follow that assumpsit for use and occupation could be maintained against a mere trespasser, who claimed no title to the land, nor entry under one, nor admitted his liability in any manner to pay rent. This would be going further than is warranted by principle or authority.

The only remaining question we propose to examine is, the refusal of the court to charge, that the plaintiff was not entitled to recover for rent anterior to the execution of the deed by the sheriff to him. It is certainly true, that the title of a purchaser at sheriff sale, for many purposes, has relation back, not only

to the day of sale, but even to the rendition of the judgment. But the question in this case is will it have relation back for the purpose of enabling the purchaser to recover the mesne profits or rents, accruing anterior to the execution and delivery of the deed. In the case of Davis v. Evans, 5 Iredell's Rep. 525, the Supreme Court of North Carolina, held, that in an action for the recovery of land, the deed of the sheriff could not be used as evidence of title previous to its execution; and in the case of Young v. Withers, 8 Dana, 165, the court held, that a purchaser of land at sheriff's sale acquired no right of entry until the execution and delivery of the deed—and it is certainly true, that it is the deed, and not the levy and sale alone, that vests the legal title in the purchaser. Previous to that time, he has neither the right of entry, the right of possession, nor the legal title to the land, and cannot have the right to the mesne profits accruing before the execution and delivery of the deed. To entitle one to recover for mesne *profits or rents*, he must be entitled to them at the time they accrue, and if not then entitled to them, he cannot recover them by virtue of a title subsequently acquired. The court should have given this charge, for if the plaintiff below is entitled to recover rents from the time of the execution and delivery of the deed, he is certainly not entitled to rent previous to that time.

The judgment must be reversed, and the cause remanded.

BRYANT *vs.* INGRAHAM.

1. The brother-in-law of a party, at whose instance the deposition of a witness is taken, is incompetent to act as commissioner.
2. A deposition, reduced to writing by a brother of the party for whose benefit it is taken, should be suppressed on motion of the opposite party.
3. A deposition taken irregularly and not in conformity with the requirements of law, is inadmissible as testimony, and may be excluded on motion, at the trial of the cause. (The distinction drawn between the cases of Cullum v. Smith et al. 6 Ala. 627, and Steele v. Dart & Co., 6 Ala. 800.)

4. When a plaintiff and defendant deduce title from the same person—the one by parol gift, the other under a subsequent will—testimony, tending to establish the insanity of the testator at the time of the execution of the will, is wholly irrelevant and properly rejected
5. The declaration of J.. that he had given a slave to B., and then hired it from him, without a delivery of the slave, is insufficient to perfect a parol gift.

Error to the Circuit Court of Tallapoosa. Tried before the Hon. Geo. W. Stone.

DETINUE for a slave by plaintiff against defendant in error. The plaintiff examined a witness, who testified that in the latter part of the year 1844, he heard one Hardy Jones, at that time the owner of the slave, say, that he had given the slave to plaintiff, and hired her from him at $5 per month until his crop was gathered. The slave remained in the possession of Jones until the early part of the year 1845, at which time Jones died. The defendant claimed the slave, as one of the distributees of Jones, being his son-in-law. In the course of the trial, the plaintiff offered to read in evidence the depositions of one William Thomas, a witness examined in his behalf; the defendant proved that the commissioner who took and certified it was a brother-in-law of the plaintiff, and on that ground moved to exclude the deposition from the jury, and the court sustained the motion, although it was shown that the commissioner was a man of good character. The plaintiff also offered to read the depositions of two other witnesses; the defendant proved that they were in the handwriting of a brother of the plaintiff, and objected to their being read on that ground, which objection the court sustained, notwithstanding it was made to appear that the depositions had been in office since the preceding term of the court, without any objection being made to the manner in which they were taken, and that the brother had reduced them to writing at the request of the commissioners, and in their presence and the presence of the witnesses, and in so doing had copied from a paper furnished by the witnesses themselves, as containing all that they knew about the matter. The witnesses, however, could neither read nor write, and the defendant at the time objected to the whole proceeding, and was overruled by the commissioners. The will of Hardy Jones, dated in June 1844, which constituted the

foundation of the defendant's title, was in evidence, and the plaintiff introduced one of the subscribing witnesses to it, and proposed to ask him his opinion as to the sanity or insanity of Jones, at the time of the execution of the will. The defendant objected, and the court sustained the objection. The plaintiff asked the court to charge the jury, that if they believed from the evidence, that the said Hardy Jones, in the year 1844, was willing to give the slave to defendant, and said in the latter part of that year, that he had given the slave to him, and if they further believed that whilst the slave was in his possession, the said Jones stated that he had hired the slave from plaintiff at $5 per month, until his crop was gathered, and that this hiring was intended by him to make the gift perfect, then an actual delivery was not necessary to perfect the gift. This charge the court refused to give, whereupon the plaintiff excepted, and he now assigns as error the refusal of the court so to charge, as well as its several rulings in respect to the evidence.

Rice and Morgan, for plaintiff:

1. It is not sufficient ground for the suppression of a deposition, that it was taken by a brother-in-law of one of the parties; and the motion to suppress was not made before the cause was on trial. See Donald v. Jones, Chilton, J. opinion in M. S., and cases there cited. The proof is clear, that Thomas acted fairly in taking the proof, and was a man of good character.

2. Glenn Barnett was a subscribing witness to the will under which the defendant claimed, and his opinions of the sanity of the testator were competent. McCurry v. Hooper, 12 Ala. Rep. 828.

3. The depositions taken by Neadham Bryant were fairly taken. The witnesses did not swear from the memorandum, which was copied; the answers were distinctly read to them after the same were written down. No motion was made to suppress the depositions. The defendant was present.

4. The charge refused by the court was clearly the law, and was well supported by the proof. Easley v. Dye, Collier C. J. opinion at the present term, and cases there cited.

No counsel for defendant.

DARGAN, J.—As it was shown that Pearson, who acted as the commissioner in taking the testimony of the witness, Thomas, was the brother-in-law of the plaintiff, the deposition was properly rejected. The mode of taking testimony by deposition is open to the objection, that a designing commissioner can readily pervert the meaning of the witness. Indeed, the witness may be made to speak what he did not intend to say. The court should, therefore, throw around evidence, thus taken, all proper guards to secure it from imposition; and it is not an unreasonable guard or precaution, to hold that one so nearly related as a brother-in-law is incompetent to act as a commissioner, at the instance of his relative, *unless the opposite party assent thereto.* It is true that Pearson, the commissioner, was shown to be a man of good character, but we cannot engraft on the rule an exception, founded on character; it would often lead to unnecessary investigation, and we think it the safer rule to hold that the commisssioner who, *pro hac vice*, acts in the stead of the judge, like him, should be *above all exception.* This is the rule that has been adopted in courts of chancery, from which the practice was borrowed; and as our statutes, permitting the testimony of witnesses to be taken by deposition and read as evidence in suits at law, do not prescribe any rule, by which the competency of the commission shall be tested, we think it better to adopt, in this particular, the rule that has obtained in courts of chancery.

2. We think the court, also, properly suppressed the depositions of those witnesses, whose testimony was reduced to writing by the brother of the plaintiff. In the case of Steele v. Dart & Co., the deposition was reduced to writing by the party himself, at whose instance it was taken, and this court held, that it was properly rejected, and in the opinion delivered, it is said, "that in the case of an illiterate or a willing witness, the party to the suit, in reducing the deposition to writing, could shape it to suit his own views." 6 Ala. R. 800. Any other person, who reduces the deposition to writing, can, with the same facility, pervert the meaning of the witness, and thus impose on the court evidence that he would not give if fairly examined. We cannot presume, that the feelings of a brother are altogether free from bias and partiality, and it is, therefore, the safer rule, to hold him incompetent to reduce the testimony to writing.

3. But it is contended, that the motion to reject the depositions came too late, as it was not made until the trial. It is true, that objections to particular interrogatories must be made before they are answered by the witness, or the objections come too late, and should be disregarded. Kyle & Gunter v. Bostwick et al. 10 Ala. Rep. 591; 2 Ala. 378; and in the case of Cullum v. Smith & Conklin, 6 Ala. Rep. 627, this court said, "that the court may suppress a deposition, even when regularly taken, if, under the peculiar circumstances of the case, injustice would probably result from using it; but when the deposition is taken in conformity to the rules of law, the motion to suppress it is addressed to the discretion of the court, and must be made before the trial." But it is very clear, that a motion to suppress a deposition, not taken in conformity with law, is not addressed to the discretion of the court; for it is not legal evidence, and a motion to reject it may be made when it is offered to be read. In the case of Steele v. Dart & Co., before referred to, the motion to reject the deposition was made at the trial, when it was offered to be read, and this court held, that the motion was properly granted. The distinction that seems to be recognised by the cases of Cullum v. Smith & Conklin, and Steele v. Dart & Co., is this: if the deposition is regularly taken, in conformity with the rules of law, but under circumstances that would induce the court to think that injustice would be done by using it, the court, in its discretion, may suppress it, but should not do it, if a motion for that purpose is not made before the deposition is offered to be read; but if the deposition be not taken in conformity with the rules of law, *it is then illegal evidence*, and *must be rejected when offered*, if a motion for that purpose is made. Indeed, it would seem unnecessary to move to reject illegal evidence before it was offered to be read, and strange that a failure to move to suppress it, in advance of an effort to use it, should legalise illegal testimony.

4. It is true, that a witness to a will, whether he be a man of medical skill or not, is permitted to give his opinion as to the sanity of the testator, at the time of executing it—McCurry v. Hooper, 12 Ala. 828; but we do not perceive what influence the question of the sanity of the testator, at the time of executing the will, had, or legally could have, on the title of the plaintiff. He does not claim under the will, but by a gift

inter vivos. If his title by gift was perfect, it is superior to any title derived under the will; but if he failed to establish a title by gift, he could not recover the slave, whether the testator was sane or insane, at the time of executing the will. The testimony, therefore, which was offered, tending to open the inquiry of the sanity of the testator, was properly rejected as irrelevant.

5. In order to perfect a parol gift of a chattel, to pass the title from the donor to the donee, the donor must part with the possession and control of it, and the possession must be delivered to the donee, or to some one for him. Sims v. Sims, 2 Ala. 117; Sewell v. Glidden, 1 Ala. 52. The mere declaration by one, that he would give or had given a chattel to another, when it is shown that the donor or owner never parted with the possession or control of it, would not be sufficient to establish a title by gift. The charge requested of the court, that such declaration, connected with the further statement, that the owner said he had hired the slave of his donee, would perfect the gift, although there had been no actual delivery of the same, was correctly refused; for if parting with the possession and control is necessary to perfect a parol gift, mere declarations by the donor cannot supersede the necessity of this act. It is the act of delivery, accompanied with the intention to give, that perfects a parol gift.

There is no error in the ruling of the court, and the judgment is affirmed.

CHILTON, J., not sitting.

GUILD *vs.* GUILD ET ALS.

1. Before the equitable estate of the wife is reduced to possession by her husband, a Court of Chancery will, he being insolvent, entertain jurisdiction of a bill filed by her for a settlement.
2. The decrees of a Court of Chancery acting *in personam*, not *in rem*, if the husband is within the jurisdiction, it is no objection to the exercise of its powers as to him, that the equitable estate of the wife, out of which she seeks a settlement, is within a foreign jurisdiction.

Error to the Chancery Court of Monroe. Tried before the Hon. A. Crenshaw, Chancellor.

The facts appear in the opinion of the court.

Sewall, for plaintiff in error:

1. The Court of Chancery has jurisdiction to make a settlement in favor of a married woman out of her own property, whether at her suit or at the suit of her husband, or his assignees or creditors. 2 Story's Eq. § 1404, § 1408; Lady Elibank v. Montolien, 5 Ves. 743; 1 Danl. Ch. Pr. 149, 150; Griffith v. Hood, 2 Ves. 452; Haviland v. Myers, 6 Johns. Ch. 27; Haviland v. Blow, do. 180; and it is of no consequence whether the fortune accrues before, or during the marriage; whether the property consists of funds in the possession of trustees or of third persons, or whether it is in possession of the court, or under its jurisdiction or not. 2 Story's Equity, § 1408.

2. That the property is not within the jurisdiction, constitutes no bar to a proceeding in this case, for in all suits in equity, the primary decree is in *personam*, and not in *rem*. 2 Story's Eq. § 743, 744, § 899; Story's Eq. Pl. § 489; Massie v. Watts, 6 Cranch, 157; Earl of Derby v. Duke of Athol, 1 Ves. sen. 202–203; Alglane v. Muschamp, 1 Vernon, 75, 135; Earl of Kildare v. S. M. Eustice, 1 Vern. 419; Toller v. Carteret, 2 Vern. 495; Mead v. Merritt, 2 Paige, 404, 405; Mitchell v. Bunch, do. 606.

3. The necessary parties have been made—the husband has answered, and a decree *pro confesso*, has been rendered against the administrators. See Acts of 1846, p. 23 § 1, 2.

4. If the bill was defective in any respect, and could have been made good by amendment, it should not have been dismissed, but leave given to amend.

No counsel for defendant.

CHILTON, J.—The plaintiff in error filed her bill in the Chancery Court of Monroe county, against her husband, Joseph Q. Guild, and William A. Lash and John Bonner, who she charges are the administrators of her deceased uncle, William Boyles, late of North Carolina. The bill charges, that

the complainant and said Joseph Q. Guild, intermarried in 1828, and reside in Monroe county in this State. That in 1844, she inherited from her deceased uncle, the said Boyles, property consisting of land and slaves, as well as choses in action, amounting in value to about five thousand dollars, the most of which property has never been reduced to possession by her husband: that he has possessed himself of a number of the slaves, the most of which have been sold for his debts under executions against him. That the property which he has not reduced into his possession, consists in lands, monies and *choses* in action. That Bonner and Lash are sole administrators of the said Boyles, and reside in Stokes county, in the State of North Carolina. The complainant further states that her husband is an improvident man, and in failing circumstances, if not wholly insolvent, and that probably the remainder of the estate which is coming to her will shortly be appropriated to the payment of her husband's debts, and thereby be utterly lost to her, and she left pennyless, and without any means of support. The bill prays that the property so coming to her may be vested in a trustee for her sole and separate use.

The husband answered and admitted the allegations of the bill, and a decree *pro confesso* was entered against Lash and Bonner, the administrators of Boyles. The chancellor at the May term 1847, dismissed the bill for want of jurisdiction, and that decree is assigned in this court as error.

It appears in this case, that the wife is without any provision made by the husband for her maintenance, and the question is, whether she can file a bill against her husband and those holding property which descends to her, but which the husband has not reduced to possession, so as to have a settlement or provision decreed to her out of it.

A similar question came before the English court of chancery in the case of Lady Elibank v. Montolieu, 5 Ves. 737–743, which was a bill by the wife against her husband, and the administrator of an intestate, (to a share in whose personal estate she was entitled as one of the next of kin) for a provision out of her share, to be set apart for her, and it was refered to the master, to see that a proper settlement was made upon the plaintiff and her children. So also an injunction has

been granted on the application of the wife against the husband, restraining him from assigning her interest in the funds, and to compel him to make a settlement upon her. Ellis v. Ellis, 1 Vin. Sup. 476; Clancy's Mar. Women, 464; Beresford v. Hobson, 1 Mad. 363.

Judge Story speaks of the wife's right to relief, as plaintiff against her husband, or his assignees, in respect to her equitable interests, as an admitted equity, which the court enforces to prevent an irreparable injustice. 2 Story's Eq. Jurisp. § 1404: and he holds that the doctrine is firmly established, that whenever the wife is entitled to this equity for a settlement out of her equitable interest against her husband, or his assigns, she may assert it in a suit, as plaintiff, by bringing a bill in the name of her next friend, (ib. § 1414.) See also note 1, 867, vol. 2, 4th edition, where the cases are collated; 5 Johns. Ch. Rep. 446; Van Duzer v. Van Duzer, 6 Paige, 366. From these authorities we think it very clear, that the wife's right to her bill is indisputable in the present case, and that the chancellor erred in dismissing it for want of jurisdiction, unless he was authorised to do so upon the ground, that the estate out of which she sought the provision was without the jurisdiction of the court. We will therefore, briefly consider this, which is the remaining proposition.

In Toller v. Carteret, 2 Ver. 494, the bill was that the defendant might redeem a mortgage, executed by Sir Philip Carteret, on the Island of Sarke, or be foreclosed. The defendant pleaded to the jurisdiction of the court, that the Island was part of the Dutchy of Normandy, and had laws of its own, and was under the jurisdiction of the courts of Guernsey. The Lord Keeper, (Sir Nathan Wright) overruled the plea, observing that as the defendant was served with process, the court had jurisdiction upon the maxim, "*æquitas agit in personam.*" In Penn v. Lord Baltimore, 1 Ves. 440, it was held, that the Court of Chancery in England, having jurisdiction of the parties, could decree the specific execution of a contract entered into in respect to the boundaries of Pennsylvania and Maryland. 1 Story's Eq. Jurisp. § 473, 899; 1 Ver. 77. Indeed, it is well settled, that the Court of Chancery has jurisdiction to decree the specific execution of contracts in respect to the sale of lands, or incorporeal heredi-

taments savouring of the realty in another State, where the court has jurisdiction of the person of the defendants. 1 Story's Eq. 58, note 2 4th ed.; 6 Cran. 148; Sutphen v. Fowler, 9 Paige, 280–282. The decrees of a Court of Equity, being *in personam*, and not *in rem*, it is no valid objection to the jurisdiction, that the decree cannot be enforced *in rem*.

In the case at bar, the husband being within the jurisdiction, and served with process, it was competent for the chancellor to compel him to do what was equitable and just in respect to the property of the wife, and to have restrained him in the exercise of his marital rights over the property, unless he would make a suitable provision for her; so that as to him, the court had jurisdiction, and the bill was improperly dismissed. But as to the administrators of Boyles, the decedent, they being without the jurisdiction of the court, and in possession of the subject matter of the suit, it is very clear, that the court had no jurisdiction as to them. The bill was therefore very properly dismissed so far as they were concerned, and the decree as to them must be affirmed; but as to the husband, Joseph Q. Guild, it must be reversed and remanded, that the chancellor may proceed to make a suitable provision for the wife's maintenance, vesting so much of the property in a trustee, for her benefit, as under the circumstances, shall be deemed adequate to her support.

Let Joseph Q. Guild, the husband, pay the cost of this court.

NANCE ET ALS. *vs.* COXE.

1. To enable the remainder man to demand security of him who has the present interest in a chattel, it is necessary that he should show that the chattel is in danger of waste or deterioration, or that it will be removed from the country, and his ability to obtain the possession, when the first estate determines, thereby rendered uncertain.
2. A bill by remainder men for security, which alleges that the property may be scattered, or that the defendant may remove it from the State,

and the complainants have no security for its delivery, when their right to possession accrues, is insufficient to authorise the interposition of a Court of Equity.

Error to the Chancery Court of Dallas. Before the Hon. David G. Ligon, Chancellor.

The bill in this case was filed by the complainants, and alleges, that in 1837, Lunda Lee, their grandfather, died, leaving two children, Betsey M. and Nancy H.—the first of whom, in 1832, intermarried with the defendant, Williams Coxe, and the last, in 1819, with James Nance, of which marriage the complainants and Pleasant Ann, the wife of Nixon Coxe, are the issue, and that they are now the only living descendants of Lunda Lee, except the said Betsey M., the wife of Williams Coxe: that previous to the marriage of the said Williams Coxe and Betsey M., they entered into a marriage contract, which secures to the heirs and descendants of said Lunda Lee all the property that the said Williams should receive from him, with its increase, in case his intended wife should have no lawful issue from said marriage: that the said Williams also executed a bond in the penalty of fifteen hundred dollars, conditioned that if the said Betsey M. should die without issue, the said Williams would return the property to said Lee, his heirs or assigns; and that thereupon the said Lunda Lee delivered to him a number of negroes, the same named in the marriage contract and bond, and that the negroes and their increase are now worth $4,000. The bill also alleges, that Lunda Lee left a will at his death, in 1837, by which he bequeathed to the said Betsey M. two negroes, which, upon her death without issue, are to go to his executors, and to be by them sold and divided amongst the said Lee's grandchildren, and by which he also bequeathed certain property to his widow, Pleasant Lee; and that the said Pleasant Lee died in 1838, leaving a will, by which she bequeathed eleven negroes to the said Betsey M. during her natural life, and to her children, if she has any, after her death, and if she should die without children, then to the children of the said Nancy H. The bill further alleges that the said Betsey M. has been married thirteen years, has never had issue, has reached the age of forty-three, and is in delicate health, and probably never will have any children: that complainants are minors, without other pro-

tector than a father near fifty years of age: that there are eighteen negroes and other property in the possession of Williams Coxe and Betsey M. his wife, acquired by them under said marriage contract and wills, and which in all probability, at some future time will belong to them: that said Williams Coxe is only related to them by marriage, is a stranger to them in feeling, and that they have no security whatever for the delivery of the property, when they may become entitled to receive it: that said property may be wasted, scattered in divers places, or transferred to other persons, and complainants be compelled to search for the same in distant States: that although Williams Coxe may at this time be in good circumstances, and sufficiently responsible, yet they have no security that he will permanently remain in this country, but he may emigrate to some distant country, as many daily do, and the possession of so large a property held on so uncertain a contingency is a great inducement to him to do so; and that he has been dissatisfied with the provisions of the two wills, contrary and vexatious in respect to the business of the estate, and has threatened that in case he was interrupted or interfered with by complainants in relation to the property, he would pay the amount of the $1500 bond, and so place the property as that it would be beyond the reach of complainants. The prayer of the bill is that the said Williams Coxe be decreed to give security, &c.

The defendant Williams Coxe answered the bill, and among other things, denied that the complainants had any interest, claim or title in and to the negroes embraced by the marriage contract, and appended a copy of said marriage contract, which recites that "whereas said Betsey M. Lee is possessed in her own right of a considerable estate in negroes," &c., the said Betsey M. Lee doth bargain, sell and deliver, &c: "To have and to hold," &c. "for the sole and separate use of the said Betsey M. Lee during her life, and at her death, to the use of the issue of said marriage, should there be any: provided, the said Betsey M. Lee may make and execute a last will and testament," &c. Whereupon, the complainants filed an amended and supplemental bill, wherein they allege that the marriage settlement was executed under the circumstances set out in the original bill, that the same was entirely

waived, and the slaves received and held by said Williams Coxe and wife, not subject to the marriage settlement, but under and subject to the bond, and that he denies that they have any reversionary interest in the property, claims it absolutely as his own and adversely to complainants, &c.

The Chancellor dismissed the bill for want of equity, which is now assigned as error.

Byrd, for plaintiffs in error:

1. The rule in England was formerly to require of the tenant for life of personal property security for the reversion, without showing that the reversion was in danger. Our court has never decided to the contrary of this, and there is every reason, growing out of the character of our population and the wide extent of our country, why the rule should be maintained here.

2. But if it be determined that a bill *quia timet*, to protect a reversion in personal property, will not be entertained by our Courts of Chancery, without showing that the reversion is in danger, then it is contended that the reversion is in danger—1st, from the condition of the parties; 2d, from the conduct of the tenant for life in holding adversely, and his threatened intention to defeat the reversion; 3d, from the nature or age of the title in reversion—and there is peculiar danger from this source.

Plaintiffs in error refer to Lewis v. Hudson, 6 Ala. 463; Nations v. Hawkins, 11 Ala. 859; Walker v. Miller, 1067; 1 Hill's Ch. Rep. 44, 74, 137, 157; 1 Story's Jurisp. 609; ib. 168; 2 Paige's Rep. 123.

Bolling and Saffold, for defendant:

Liability to abuse trust is no ground for injunction; neither is temptation to abuse it. Glassington v. Thwaites, 1 Sim. & Stuart 124; Lewis and others v. Hudson and others, 6 Ala. Rep. 466, and cases cited.

Generally speaking, where the testator thinks proper to repose a trust, in such a case, until some breach of that trust is shown, or at least a tendency thereto, the court will continue to intrust the same hands, *without calling for any other security than what the testator has required.*" Slanning v. Style, 3 Peere Wms. 336, 337.

In general, a bill of peace cannot be sustained, until the parties have ascertained their rights at law. Gunn v. Harrison, 7 Ala. Rep. 585; Colburn v. Broughton, 9 Ala. Rep. 351.

Supplemental bills should be sworn to. Bowie v. Minter, 2 Ala. Rep. 412.

The court will not allow amendments, by inserting facts known to the plaintiff at the time of filing his bill, unless some excuse is shown for the omission. 1 Daniel's Ch. Pr. 455, note 2; Whitmarsh v. Campbell, 2 Paige 67; Prescott v. Habbel, 1 Hill's Ch. 217.

DARGAN, J.—In order to entitle a remainder-man to demand security of him who has a life estate in the chattel, that it shall be forthcoming when he in remainder shall be entitled to the possession, it must be shown that there is danger of waste or deterioration to the chattel, in the hands of the party who has the present interest, or that it will be removed from the country, so as to render it uncertain whether the remainder-man can obtain possession at the determination of the estate of him who has the present right. The rule formerly was, that he who had the remainder could in all cases apply to equity, to obtain security from him who had the life estate, that the property should be delivered to him when he became entitled to possession; and it was not necessary to show either waste or danger of waste, to entitle him to this relief. This rule, however, has long since been abandoned, both in England and the United States, and the remainder-man must now show danger to his interest, before he can obtain security for the delivery of the property, when he shall be entitled to possession. Lewis v. Hudson, 6 Ala. 462; 2 Story's Eq. 140, 141; 3 Randolph, 397; 2 Paige, 132. This principle, which is now recognised by all Courts of Chancery, shows that the complainants are not entitled to the relief they seek. The bill, it is true, states that the property may be scattered, or that the defendant may remove from the State, and that complainants have no security for the property when they shall be entitled to receive it. These allegations might be made in every bill, but they do not afford a ground for relief, for equity can only interpose when some facts are alleged which induce the Chancellor to believe that injury or loss will befal the remainder-

man without his aid, requiring the present possessor to give security.

But it is contended, that the complainants are entitled to the relief prayed, as to the slaves embraced in the marriage contract between the defendant and his wife, because he denies the right of the complainants to them in his answer to the original bill. It is not necessary to decide whether the assertion of the absolute title by him who has the present right will entitle the remainder-man to apply to equity to protect his rights; for the allegations of the original and supplemental bills, in connection with the exhibits on which the complainants claim title, do not show that the complainants have such a title as will enable them to demand security. We do not wish to be understood as determining that the complainants may not have a title in remainder to those slaves; but the bond set out in the original bill, together with the marriage contract, without other allegations or facts in connection with them, do not show a title in the complainants to the slaves embraced in the marriage contract, either in remainder or otherwise.

There is no error in the decree, and it must be affirmed.

OWEN ET AL. *vs.* PAUL.

1. A vendee of land, who has re-sold it with covenant of warranty, and delivered up the possession, if the deed from the original vendor is lost, may apply to a Court of Chancery to compel the widow and heirs of the vendor to supply the loss, by a re-conveyance, without waiting until the heirs assert title to the land.
2. An averment in a bill, filed by a vendee to establish a lost deed, that he had caused search to be made "in all such places as he supposed it might possibly be found," is sufficient, without alleging that he had searched for it among his own papers.
3. The affidavit of the complainant of the loss of a deed, is not evidence of the fact of loss, but such loss must be proved, and is usually arrived at inferentially.
4. Where a bill alleges that a deed, charged to be lost, was deposited in the office of the Clerk of the County Court, proof should be made of a

search in that office, as otherwise the presumption would arise that it was still there.

5. Where a bill to establish a lost deed alleges, that the then wife of the vendor had therein relinquished her right of dower, the allegation not being admitted, no decree can be made barring her dower, without proof of a substantial compliance with the requirements of the law in existence at the time as to the mode in which *femes covert* should relinquish their dower interests.

Error to the Chancery Court of Mobile. Tried before the Hon. A. Crenshaw, Chancellor.

THE facts of this case are fully set out in the opinion.

HOPKINS & WALKER, for plaintiffs in error:

1. The complainant shows in his bill that he is neither in possession, nor entitled to the possession of the premises, that he has no interest in them, but that the estate belongs to others. For this want of title apparent on the face of the bill, a demurrer lies, or the bill for the want of title to relief, may be dismissed. Story's Eq. Pl. 389; 1 Story's Eq. 101, 102.

2. The only ground of equity stated in the bill arose after the alleged conveyance of the premises by the complainant, and consists of the improvements made by Primrose & Carter upon the premises with the knowledge of G. W. Owen. Of this equity the complainant cannot avail himself on this bill. The complainant does not allege in the bill that he had searched for the supposed deed among his own papers.

3. An affidavit of the loss of the deed, made and filed by the complainant with his bill, was necessary to give jurisdiction to the Court of Chancery, but the complainant has no right to relief, unless he prove, on the hearing, the loss of the deed or the loss was admitted by the answers. 11 Ala. 499, Hooe v. Harrison; 1 Story's Eq. 104; 9 Vesey's Rep. 466. The affidavit is not competent evidence of the loss on the hearing. See authorities last cited. As there was no proof upon the hearing, of the loss of the deed, the bill should have been dismissed. It is alleged in the bill *that the deed was a conveyance of the fee simple with warranty* of title. The only evidence that any deed was made consists of the following statement in the deposition of A. S. Lipscomb, "I believe that I saw titles pass at the same time as the purchase—a fee simple title, with the

usual warranties." The statement of his conclusion is no substitute for the facts he ought to have alleged, to show Mrs. O. made the acknowledgment required by law, and the bill is as fatally defective as if it contained no allegation of any acknowledgment of the deed by Mrs. Owen. 12 Ohio Rep. 377; 7 Ohio Rep. 195; 6 Ohio Rep. 313, 358; 20 Johns. Rep. 301; 4 Serg. & Rawle, 272.

G. N. STEWART, for the defendant:

1. Chancery has jurisdiction to relieve when a deed has been lost, under head of accident. 1 Story's Eq. 102, § 84; 1 Iredell's Eq. Rep. 252, 268; 1 Devereux's Eq. Rep. 456; 3 Atkyns, 132; 1 Ala. 482; Jeremy's Equity, 359. 2—Chancery has jurisdiction to remove a cloud hanging over an estate. 12 Ala. 734. 3—Also to quiet a title. Hitchcock v. Bank of the U. States. 4—Also to prevent multiplicity of suits. 3 Stewart, 383, 385-6. 5—And to protect a party against an impending danger, and to avert loss, by way of preventing injury which might otherwise happen. 3 Ala. 169; 2 Story's Equity, 142. 6—A party not immediately interested but having an interest which may suffer in future, will be relieved. 1 P. Williams, 731.

2. If even we could not show that any deed had been made, a complete right in equity is shown to bar the defendants as heirs of Owen. Sale, payment, and putting into possession, with valuable improvements, are of themselves sufficient to bar the defendants as heirs. If they deny these things, they are proved. If they admit this, and deny making the deed, still they show they are barred from any claim. If the loss of the deed only is denied, then the right is admitted, just as if the deed was not lost. 8—Under the proof, no meritorious defence or right can in any way be pretended. 3 Stewart, 207, shows that the proof of sale, payment and possession, are sufficient to maintain a good right.

CHILTON, J.—This suit was commenced by original bill filed in the Chancery Court of Mobile by James Paul, the defendant in error, against the plaintiffs in error, in which it is substantially avered that one George N. Owen, on the 6th of May 1835, at a sale made by the trustees of a company, known

as the Orange Grove Company, of lots in the city of Mobile, purchased a number of said lots on speculation, among which were lots numbered five and ten, in square numbered two hundred and sixty-one, which are particularly described in the bill: That said Owen held the deed of Calvin Norris and James McGehee, trustees for said company, bearing date the 16th day of May 1835, and duly recorded: That on the 4th day of February 1836, said complainant purchased said two lots of said Owen, at the price of seven thousand dollars, one half of which sum he paid in cash and executed a note for the remaining sum due in ninety days, which he subsequently paid in full: That upon said purchase being made, said Owen caused to be prepared a proper deed of conveyance of said property in fee simple with warranty of title, and did himself sign and seal the same, and did procure his wife to sign and seal it: That the said deed was lawfully acknowledged by said Owen before a Notary Public, and was also acknowledged by Louisa S. Owen, his said wife, separate and apart from her said husband, as the law required, and said deed was certified by said Notary for registration in due form: That said deed was delivered, as also the possession of the lots to the complainant, upon the completion of the payment for the same, said lots then being partly covered with water from the Mobile bay, and requiring great labor and expense by filling up with dirt to render them useful: That shortly after the purchase, complainant re-sold the lots to John G. Aiken, for ten thousand dollars, and on the 7th day of March 1836, conveyed the same to him with warranty of title, and that he re-sold to Sayre, Converse & Co., on the 8th of April 1836, for fifteen thousand dollars, who sold on the 8th July '36, to William D. Primrose for thirty thousand dollars, since which time said lots have been conveyed and mortgaged to divers persons to the complainant unknown: That the possession of the lots were delivered to the respective purchasers, and that while Primrose had the same in possession, he caused them to be filled up, and made other valuable and permanent improvements amounting to about ten thousand dollars, since which time the subsequent purchasers have improved said lots to the extent of some $15,000: That the possession of the complainant, and those claiming under him, has never

been questioned, controverted or disturbed by said Owen in his life time, nor by his widow, heirs or representatives since his death: That both Owen in his life time, and his widow and heirs since his decease, were fully apprised of the possession, and that said improvements were being made, and acquiesced in the same, well knowing that the property did not belong to them: That upon the execution of the deed by Owen to the complainant, the latter deposited it with the clerk of the County Court of Mobile county for registration, and until a short time before the filing of this bill, he supposed it could be found in said clerk's office, but on diligent search in said office, it could not be found, and he has been unable to find it elsewhere: That said deed is in full force, and complainant has never done any act to impair his right to the same, but is entitled to its custody, and to ask the aid of the court to restore to him the muniment of title which has been lost or mislaid, so that he cannot obtain the same.

The bill further charges, that said Owen died in the fall of 1837, his widow, Louisa S. Owen, and ten infant children, who are named in the bill, surviving: That said children are his devisees and heirs at law, and the said Louisa is the sole administratrix of his estate, all of whom reside in the county of Mobile: That complainant has called on said Louisa, to renew said deed, but she insisted she had no power to bind the infant children, and refused to do any thing in the matter for the relief of the complainant.

The bill prays that said Louisa and the children be made parties defendant: That she discover the books and papers of the decedent, evidencing the transaction, and concludes with the prayer, that the court decree a new deed to be executed to the complainant, securing to him such rights as were secured to him by the said deed above described, or that such decree be made as shall divest the defendants of all title, and bar them, and vest the same in complainant and these claiming under his conveyance, and that his title may be quieted, &c., and for general relief.

To this bill is appended the usual affidavit of the execution of the deed by Owen, its loss, and that it has never been cancelled, released, &c., by complainant.

The widow answered the bill, admitting title in her hus-

band as charged, and admitting his death, but avering a total ignorance of a sale to the complainants, and a want of all recollection as to the execution of a deed conveying away her right of dower in the premises: Avers that she never knew the complainant until he called on her a few days before the filing of his bill, to make inquiry concerning the subject matter of it: That she has enquired of those familiar with her husband's business, for information as to the alleged sale, and has examined his books and papers for evidence concerning it, but has been unable to arrive at any evidence which throws any light upon the subject. She therefore denies the allegations of the bill, and denies also that she had knowledge that improvements were being made on said land, or that defendant, or any one claiming under him had possession of the same, until a short time before the bill was filed, she then learned that some improvements had been made by the complainant, or some one who held under him. Several witnesses were examined of whose testimony we will speak hereafter.

The chancellor decided that the complainant was entitled to the relief he prayed by his bill, and after decreeing that the proof fully established the sale and execution of the title deed by said Owen in fee simple with covenant of warranty as to title, further decreed that said Paul was entitled to all the rights which said deed did convey to him, and that he be invested with all rights and title which said deed did convey to him, and the heirs and legal representative be bound to warrant the title, as if complainant still had said deed, "and that the complainant be in all things protected by this decree as if said deed were not lost," &c.

1. It is objected to this bill on the part of the plaintiff in error, that the complainant therein does not show a title to the relief which he seeks, not being in possession, nor entitled to the possession, but the estate belonging to others. The complainant is bound by his covenant of warranty to protect and defend the title of the persons to whom he sold, and in order effectually to do this, he must have the evidence of his title which he swears is lost. We think the peril to which he is exposed by reason of the loss of the only evidence of title which he held to the lots in question, is sufficient to entitle him to come into this court for the establishment of his title.

He but invokes the exercise of a very salutary jurisdiction which the court of equity possesses of administering preventive justice. 1 Story's Eq. § 84, and note 3. The complainant should not be compelled to wait until he was sued upon his covenants of warranty, or until the heirs of Owen had brought their ejectment against those claiming under him. It is sufficient that he was exposed to such embarrassments in respect to the title, to justify his resort to a court of equity, to remove the cloud which hangs over it. In Burt v. Capely, 12 Ala. Rep. 734, it was held that a party whose deed was lost, might go into chancery to enjoin the judgment creditor of her vendor from selling the land, and this court rendered the injunction perpetual, upon reversing the decree of the chancellor dismissing the bill. The effect of such relief in this case is not only to remove a cloud from the title, and to protect the complainant from impending danger, but it may prevent much litigation in respect to the lots, since the title has passed through the hands of numerous purchasers who are dependent upon the complainant's title for their protection and on failure of which, each must seek his indemnity from the other. We can see no valid objection to the exercise of the jurisdiction, guarded as it is required to be by the oath of the party who makes the application in respect to the loss, and, usually subjecting him to the cost of the proceeding, it is not probable that it would be liable to much abuse.

2. It is insisted that the complainant does not allege he had searched among his own papers for the deed, and that for this reason the bill should have been dismissed. The record does not show that the party had papers among which the deed would be likely to be found, and the complainant avers that his recollection is that he left the instrument in the clerk's office, which has been diligently searched. Besides, it is avered that he caused search to be made in all such places as he supposed it might possibly be found. This is certainly a sufficient averment as to the search, and this objection to the bill is consequently overruled.

3. It is further contended on the part of the plaintiff in error that the evidence in this case does not show either the existence or loss of such a deed as is specified in the bill, and that the affidavit of the loss attached to the bill is not evidence on

the final hearing of the fact of loss, but that it must be proved by evidence as any other fact. In Hooe v. Harrison, 11 Ala. Rep. 499, it is said that in cases where relief is sought upon a lost instrument, if the loss is not admitted by the answer of the defendant, it must be established at the hearing of the cause by competent and satisfactory proof, and the affidavit of the loss required to be made as a guard upon the preliminary exercise of jurisdiction is not admissible as evidence. 1 Story's Eq. Jurisp. (4th edit.) 106, § 88, and authorities cited in note 2. In Plummer, et al. v. Barkerville, 1 Iredell's Eq. Rep. 252, it was held, that although a court of equity had jurisdiction to set up a lost deed and to decree another conveyance to be made by the bargainer or his legal representatives, yet the plaintiff must clearly prove that such deed once existed, its legal operation and its loss. As respects the proof of loss, it is a fact which from its nature in many cases, is not susceptible of positive proof, but must be arrived at inferentially. The plaintiff could prove that he had the instrument, and that after diligent search he had been unable to find it, but as to proving the manner of the loss, in most cases it would be impracticable, and the law does not require impossibilities. Without attempting to lay down any general rule applicable to all cases, it is sufficient to remark in this case, that as the complainant charges in his bill, that he deposited the deed in the office of the clerk of the County Court for Mobile county for registration, he should have proved, that search had been made for it at least in that office, for aside from all proof on the subject we must presume it is still in the office where, according to his recollection, he left it. Jackson, *ex dem.* Schuyler v. Russell, 4 Wend. 543; 6 Verm. Rep. 399; 5 Binney, 270. See also the cases collated in 3 Phil. Ev. (C. & H. notes) 1223, *et seq.* n. 867. In order to prove the loss, the complainant should show that he has used ordinary diligence to procure the instrument by a search where it would be likely to be found. Let us now turn to the proof in respect to the existence and contents of said deed, and see whether the allegations of the bill are sustained.

F. L. Owen, the brother of the deceased, states that while said George W. Owen was Collecter of the Port of Mobile, witness was his deputy, and saw said complainant and Paul

have an interview, but he was engaged and at some little distance from them, so that he cannot speak satisfactorily as to what was said. That after Paul left, the deceased told witness he had sold him some lots, and had received from him a cash payment, which he then held in his hand, being a roll of bank paper; that his said brother's books and papers, had been burned in 1838, or, he has no doubt a full history of the transaction could have been obtained from them. He also proves the note which Paul executed for the payment of the lots, to be in the hand writing of George W. Owen.

Jesse Carter proves, that while Primrose held possession of the lots, he hired carts and purchased dirt from the said George W. Owen to fill up the lots. William D. Primrose understood both from Paul and George W. Owen, that payment had been made in full, for the purchase, but is unable to designate the lots. He also was informed by said Owen that he had made a deed for some lots to Paul, but the character of the deed, or the description of the lots he is unable to give, nor does he know that the widow ever signed the deed or relinquished dower—believes Owen put Paul in possession; frequently saw said Owen present when the lots were being improved by Primrose, and never heard him claim title to the same. John G. Aiken proves that Owen informed him, that Paul had paid him $7000 for the lots, and witness had the information from the same source, that Paul derived title from Owen. Abner S. Lipscomb proves, that Owen was a large purchaser of town lots in Mobile, at a sale made by the Orange Grove Company. He remembers that complainant purchased a lot of ground from George W. Owen, in the year 1836, and paid down half the purchase money and gave his note for the remainder at three or six months. That Owen afterwards told the witness, that he had received the whole of the purchase money, and that Paul had discounted his own note. He also states as follows, "I believe that I saw titles pass at the same time of the purchase—a fee simple title with the usual warranties. I afterwards saw Paul in possession of the lots." Witness recollects the payment the more distinctly from the fact, that Owen afterwards frequently remarked to him, he felt under obligations to him for procuring him so punctual a purchaser.

This is all the testimony which is material in the cause, and

it is too clear to admit of doubt, that it fails to prove the loss of the instrument. Neither is it very satisfactory to show the legal effect of the instrument, as to the character of the warranties. We think however, the chancellor under the proof, was justified in the conclusion, that there did exist a deed with covenant of warranty as to the title, and this is as far as his decree establishes the warranty against the heirs and legal representatives. But there is no proof that any search was ever made for the deed which is avered to have been lost, and consequently no proof of the loss. The decree for this reason, were there no other, cannot be sustained.

4. But there is another and more palpable objection to it, so far as the widow is concerned. The effect of the decree is to bar her right to dower in the land, or any interest in it, whereas there is no proof whatever that she ever, in any manner, relinquished her right to dower, or ever signed the deed which the decree says shall be as operative and effectual as if Paul still had the same. This was manifestly an error. In order to bar the widow of her claim for dower, she must have relinquished it in some mode which the law recognises and will enforce. That the wife was examined touching her execution of the deed, separate and apart from her husband, and acknowledged it, as the bill charges, "according to law," is, although a loose mode of pleading not to be encouraged, in our opinion sufficient to let in proof of the manner of the acknowledgment and examination, no demurrer having been interposed in the court below; but there is a total absence of proof on the subject, and it is perfectly clear that Mrs. Owen's rights could not properly be affected in any way by the proceeding.

According to the allegations of the bill, the deed and acknowledgment in this case were made before the passage of the act of 1839, authorising *femes covert* to bar their right of dower by joining with their husbands in the execution of conveyances, in the presence of two or more credible witnesses, or upon acknowledging the same before some person authorised by law to take the acknowledgment of deeds. The certificate of acknowledgment must then conform to the law as it previously existed, and must have been made upon a *private examination, separate and apart from her husband.* Clay's Dig. 155, § 27. The substantial requirements of this statute must

be complied with. Agricultural Bank of Miss. et al. v. Rice et al., 4 How. (U. S.) Rep. 225, 236. Neither the certificate nor deed, if any exist, is before us. We do not, therefore, desire to go without the case made by the pleadings, to express any opinion in advance, as to their legal effect. We would, however, observe, that the decision of the Supreme Court of the United States upon the Mississippi statute, which is similar to our own, is, we think, a correct exposition of the law upon this point. See also Connell v. Connell, 6 Ohio Rep. 358; Brown v. Farran, 3 Ohio Rep. 140; Meddock v. Williams, 12 ib. 377; 7 ib. 195.

The bill shows that a deed, such as the parties agreed upon, was executed by Owen, and delivered to the complainant; jurisdiction cannot be therefore entertained of it, upon the ground of specific performance. The contract, according to the plaintiff's own showing, has already been specifically executed, and the aid of the court is invoked to supply the loss of the evidence of that execution. The complainant under this bill cannot have relief predicated upon the ground that no such deed was made. The proof which entitles the complainant to relief must be such proof as is consistent with and sustains the allegations of the bill.

Decree reversed, and remanded.

GODBOLD ET AL. *vs.* MEGGISON, ADM'R.

1. An entry of record, in a suit commenced in the name of T. S., that it was represented to the court that G. D. M. was the administrator of T. S., with a prayer that G. D. M. be made a party plaintiff, is sufficient to authorise the appellate court to infer the death of T. S., and that the action of the court was based on sufficient evidence of that fact.
2. Where a bond, or note, given to one as guardian, is sued on in his name, and he dies, the suit should be revived in the name of his administrator, and not in that of the minor, or guardian subsequently appointed.
3. Where service of the writ has been accepted, and omitted to be proved, it may be proved and entered at a subsequent term; and where

the record disclosed an order "that proof of the acceptance of the writ be now entered as of the last term," this court will intend that the proof was made.

Error to the Circuit Court of Baldwin. Tried before the Hon. John Bragg.

The facts in this case appear in the opinion of the court.

K. B. SEWALL, for plaintiffs in error:

1. The death of Thomas Sanders, the original plaintiff, is not in any manner shown upon the record. Meggison was, therefore, improperly made a party in his stead. Curry & Co. v. Paine, adm'r, 3 Ala. 154; Hughes v. Ringstaff, 11 do. 566; 1 Saund. Pl. & Ev. 402; Thompson v. Donaldson, 3 Esp. 63; Try v. Hard, 8 Pick. 529.

2. If the death of Sanders did appear, his successor as guardian, and not his administrator, should have carried on the suit. Harbin v. Levi, 6 Ala. 402, 403.

3. The suit was improperly brought in the name of *Sanders, guardian;* it should have been in the name of his wards, by their guardian. Sutherland v. Goff, 5 Por. 508; Caskadden v. McGlice, 7 Watts & S. 140.

4. There was no proof of the acceptance of service by Ethcridge; leave to make proof is not sufficient. Moore v. Horn et al., 5 Ala. 235; Welch v. Walker, 4 Por. 120.

C. W. RAPIER, contra:

1. The record sufficiently shows, that at the fall term 1847, the death of the plaintiff was suggested, and Meggison, his administrator, made a party.

2. The administrator of the estate of Sanders was properly made a party plaintiff. Sanders was the real plaintiff in the action, and the right of action was in him, as appears from an inspection of the note sued on. It must be intended, from the word *bearer* used in the note, that the amount was payable to Sanders in his individual right. Clay's Dig. 313, § 1; 6 Ala. 399; 15 Wend. 345; 9 do. 425; 5 Ala. 202.

3. It was not error to allow, at a subsequent term after judgment, an entry, *nunc pro tunc*, of proof of the acceptance of service of the writ by one of the defendants. See 5 Ala. 234.

DARGAN, J.—This suit was commenced by Thomas Sanders, on a promissory note, given by the defendants to him, by which they promised, twelve months after date, to pay to Thomas Sanders, guardian of the minor heirs of David Moniac, deceased, or bearer, four hundred and fifty dollars. A declaration was filed against all the defendants, in the name of Sanders, at the fall term 1846. At the fall term 1847, the following entry was made: This day came the plaintiff, and represented to the court that George D. Meggison is the administrator of Thomas Sanders, deceased, and prays the court to make said Meggison, administrator as aforesaid, a party plaintiff to this suit; and the defendants failing to file their plea within the time prescribed by the rules of this court, it is considered that the plaintiff recover, &c.

The first assignment of error is, that Meggison was improperly made a party, as the death of Sanders does not appear of record. It must be admitted, that the entry is very informal; but we think it sufficiently indicates the death of Sanders. The question is not, what shall be sufficient evidence to establish the death of a party to the suit; but it is, whether the record shows the death of Sanders, the original plaintiff. The language is, that George D. Meggison is the administrator of Thomas Sanders, deceased. From this we are bound to infer his death, and that the action of the court was based on sufficient evidence of that fact.

2. The second assignment of errors denies the right of the administrator to prosecute the suit, and it is insisted that the note shows on its face that it was the property of the minor heirs of David Moniac, deceased, and therefore their guardian, appointed after the death of Sanders, should have continued the suit in his own name. The rule of pleading is, that the suit must be brought in the name of him in whom is vested the legal title. Here the promise was to Thomas Sanders, and not to the minor heirs of David Moniac. For a breach of this promise, Sanders had the right to sue, and this right survived to his administrator. It is true, that if a note is given to an administrator, which is assets of the estate, if he is removed from office, and afterwards sues on the note, the defendant may plead this in bar of the suit. Harbin v. Levi, 6 Ala. 402;. Dunham v. Grant, 12 Ala. 105. But even in the

case of an administrator suing on a note, given to him as such, it must be made to appear that the note belongs to, or is assets of the estate, and that the administrator is removed. But if the contract was made with the administrator, he is not compelled to sue in his representative character for a breach of it; but he may declare in his own right, and if it appears that the contract was made with him as administrator, this will be regarded but as *descriptio personæ*—Harbin v. Levi, 6 Ala. 401; 6 East. 405; Chitty's Pl. 14;—and he will be permitted, in his own name, to recover, notwithstanding he may be described in the contract as administrator, unless the defendant, in his defence, shows that the debt or cause of action belongs to the estate, and that the plaintiff is not the administrator. Assimilating, then, the note sued on to a note given to one as administrator, we would hold that there was no error, for there was no proof to show that the note did not belong to Sanders, save that he is described in the note as guardian of the heirs of Moniac; and this would be considered as *descriptio personæ* merely. We, however, are of the opinion, that a note or bond given to one as guardian, is correctly sued on in his name, and if he be dead, the suit should be in the name of his administrator; and that the legal right of action is neither in the minor nor in the guardian subsequently appointed. The promise is made to the guardian, and he alone is authorised to sue for a breach. Walker v. Walker, 3 Pennsyl. 21; Pond v. Curtis, 7 Wend. 45; 4 Scam. 325.

3. The writ was not executed by the sheriff on Etheridge, one of the defendants; but on the back of it is written *service accepted*, and signed by Etheridge. The record shows, that at a term subsequent to the rendition of the judgment, an entry was made as follows: This day came the plaintiff, and moves the court that an order *nunc pro tunc*, as of the last term of this court, be now entered, that Etheridge did accept service of a branch writ in this cause, and that the plaintiff be permitted, as of the last term, to prove the acceptance of service: It is therefore ordered by the court, that proof of the acceptance of service be now entered, as of the last term. It is not denied, but that the plaintiff, if he has neglected to prove the acceptance of the writ before judgment is rendered, may, even at a subsequent term, show to the court below that ser-

vice was accepted, and have that fact entered of record, and thereby avoid a reversal of the judgment. Moore v. Horn & Bouldin, 5 Ala. 234. But it is contended, that the entry merely shows that permission was given to make such proof, and not that proof was made. We think a reasonable and fair construction of the order is that the proof was made. The language of the entry is: "It is therefore ordered, that proof of the acceptance of the writ be now entered, as of the last term." The evidence of the acceptance of service need not be entered of record, but it need only appear that proof was made that the service was accepted; and this, we think, is the intendment we should place on this order.

Let the judgment be affirmed.

CAMPBELL *vs.* THE STATE.

1. A judgment upon an indictment for a nuisance, "that the nuisance be abated forthwith, at the costs of the defendant, and the sheriff is charged with the execution of this order," is in effect a command to the sheriff to abate the nuisance, and to that extent erroneous, but will be amended in the appellate court, so as to command the defendant to abate the same, if it has not been already done.

Error to the Criminal Court of Mobile. Before the Hon. John E. Jones, Judge.

This was an indictment against plaintiff in error for a nuisance in erecting and continuing a number of large posts in the Mobile river, so as to obstruct the navigation thereof. A verdict of guilty was returned by the jury, and thereupon a judgment was rendered, which is sufficiently set out in the opinion of the court for a full understanding of the question involved. The judgment of the court is now assigned as error.

G. N. Stewart, for plaintiff:

1. The error relied on is, that the court gave judgment that the sheriff should *abate the nuisance* charged in the indictment,

and in the indictment it is not specified particularly where the nuisance was—it is described only in general terms. The indictment is in conformity with the usual forms, and the court does not by its sentence or judgment direct the sheriff to abate. The party is bound to abate the nuisance himself at his peril, and if he do not, he may be indicted again till it is done. Russell on Crimes says, (top page 309, side page 335,) "the object of the indictment is to remove the obstruction. The judgment is a fine, and an order on the defendant at his own costs to remove the nuisance" and cites, 2 Strange, 686; 1 Hawk. Pl. of Crown c. 75, § 15.

2. It is further laid down that to warrant a judgment to abate the nuisance, it must be avered to be continuing. Same page in Russell. And that if the court is satisfied that the nuisance is effectually abated before judgment is prayed on the indictment, judgment to abate will not be given. Also it is said if the nuisance is for any erection which is carried too far, as a house built too high, the judgment or order on defendant to abate is only for the excess.

3. The rule of law must be general, it may often be a case where a mere omission to do the offensive act is required. How could the sheriff reach that. See 2 Strange, 684, 688. It would be a troublesome practice to adopt a different rule for each special case, the practice would be confused. 1 Haw. Pl. of Crown, 695, § 15. The judgment is that the offender be commanded to abate. The forms of those indictments do not undertake specially to describe the nuisance, so that judgment cannot be given that the sheriff abate. 3 Chitty's Crim. Law, 635–638. Even a second civil action may be brought for continuing a nuisance. 1 Lord Raymond, 370.

Attorney General, contra:

1. The principle laid down in Viner's Abr. seems to favor the judgment of the court, to wit: "If a nuisance had been levied in the time of the defendant, it *shall be ousted by the sheriff by judgment of the court.*" Viner's Abr. 16, p. 46.

2. Any one may abate a nuisance. 1 Russ. 272, top page, and it could make no difference to the defendant below, who performed that task, so far as defendant was concerned, it was all the same to him, whether done by the sheriff or any one

else. And so the court ordering the sheriff to abate it, worked no injury to defendant, even if the court had no authority to make that order, for a judgment will not be reversed for an error that works no injury to the party against whom it is commitred. Lindsay & Adkinson v. State, 15 Ala.

3. The *removal* of the nuisance is the *main object* of the indictment, and the court will adapt the judgment to the nature of the case. 1 Russ. 273, top page.

4. So much, supposing that it is the judgment of the court that the sheriff shall abate the nuisance. It may be doubted whether or not that is the judgment of the court. The words in the judgment entry that "*the sheriff be charged with the execution of this order*" does not *command* the sheriff to abate it, and really forms no part of the judgment.

COLLIER, C. J.—The indictment charges that the nuisance for the erection of which the defendant was convicted is continuing, and the only question raised is, whether the judgment prescribing the manner of its abatement is legal. After the recovery of the fine assessed by the verdict, the judgment proceeds thus, "and it is further ordered by the court, that the nuisance be abated forthwith at the costs of the defendant, and the sheriff is charged with the execution of this order." This is certainly a judicial sentence, and in effect, is precisely the same as if the sheriff had been commanded *in totidem verbis* to abate the nuisance, and the defendant been charged with the cost of abatement.

All common nuisances are punishable by fine and imprisonment, and as its removal is usually the chief end of the indictment where it is stated to be continuing, and does in fact exist at the time of the judgment, the defendant may be commanded by the judgment to remove it at his own costs. Only so much of the thing as causes the nuisance ought to be removed. In Rex v. Stead, 8 T. Rep. 142, Lord Kenyon said, "when a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance down to the time of taking the inquisition; it was so stated in Rex v. Pappineau, *et ad hunc existit*, and in such cases, the judgment should be that the nuisance be abated. But in this case it does not appear in the indictment that the nuisance was then in exis-

tence, and it would be absurd to give judgment to abate a supposed nuisance which does not exist. If, however, the nuisance still continue, the defendant may be again indicted for continuing it." See also Rex v. The Justices of Yorkshire, 7 T. Rep. 468; 1 Russ. on Crimes, 305–306. If the court are satisfied that the nuisance for which the defendant is indicted is effectually abated before judgment is prayed upon the indictment, it will not in its discretion give judgment to abate it. 3 Chit. Crim. Law 3d Am. edit. 607 (*a*) note; 7 Bacon's Abr. 234, (Bouv. edit.) In Barnet v. Ihrie, 1 Rawle Rep. 44, it was supposed that a *distringas* was the proper writ to compel the defendant himself to abate the nuisance. If the nuisance for which the party was convicted still continues, the continuance will form a distinct offence, for which he may be again indicted. The People v. Comstock, 8 Wend. Rep. 549; The King v. Reynells, 6 East. Rep. 315; 1 Chit. Criminal Law, 657, 3d Am. edit. If the citations we have noted, correctly indicate the form of the judgment upon a verdict of guilty for a continuing public nuisance, there can be no question that so much of the judgment as orders the abatement of the nuisance in the present case at the defendants costs, is irregular and unauthorised. Whether injury has or could result from this departure from the law, we have no means of determining, and in a criminal prosecution we incline to think that it would not be proper to institute such an inquiry. In such cases we should suppose the accused has the right to insist upon a compliance with the law, and cannot be compelled to acquiesce in an illegal judgment because it is not more prejudicial to him than it would have been if it had been regular.

There is certainly much force in the arguments of the counsel for the plaintiff in error, that the sheriff cannot know what part of the erection complained of, is a nuisance, or whether so much of it has not been removed by the defendant himself as is indictable. To this we may add that the defendant has the right to select the mode of abatement and the persons by whom it shall be executed with a view to economy, and thus save as far as may be, the costs incident to such a service by an executive officer of the law.

We have no discretion which authorises us to sustain the

judgment of the Criminal Court. It is therefore reversed as respects the order to the sheriff to abate the nuisance, and will be here rendered commanding the defendant to abate the same, if it has not already been done.

Doe ex Dem. SHELTON *vs.* CARROL et als.

1. The widow is entitled under the statute (Clay's Dig. 173, § 7) to retain possession of the dwelling-house in which her husband most usually dwelt next before his death, free from molestation and rent, until dower is assigned her, and may successfully defend an action of ejectment instituted against her by the alienee of the husband.
2. Where the widow is in possession of the dwelling-house in which her husband most usually dwelt next before his death, it is not her duty, but the duty of him who is entitled to the fee, to become the actor in procuring the assignment of her dower.
3. The marriage of the widow does not work a forfeiture of her right to retain possession of the dwelling-house in which her husband most usually dwelt next before his death, until dower is assigned her.
4. An alienee of a deceased husband may resort to a Court of Equity to have dower in the premises allotted to the widow.
5. The gratuitous payment of rent by one in possession of real estate does not estop him from showing the true character in which he holds the premises.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg, Circuit Judge.

The facts of this case are fully stated in the opinion of the court.

C. W. Rapier, for plaintiffs in error:

1. It is well established by authority, that a mere dower interest in land, unconnected with or unsupported by the privilege of quarantine, is no defence to an action of ejectment.—See 4 Kent's Com. 61; Jackson v. O'Donaghy, 7 Johns. 247; Moore v. Gilliam, 5 Munf. 346; Chapman v. Armistead, 4 Munf. 382; Jackson v. Van, 17 Johns. 167; Sigler v. Van Ripel, 10 Wend. 414; 9 Mass. 13.

2. Under the English law, the widow's quarantine was a privilege restricted to the possession of the capital mansion of her deceased husband, and in the duration of its enjoyment limited to forty days. Under our statute, the privilege is of the same character, but enlarged. Here the widow may retain possession for an indefinite period of time, until dower shall be assigned her. (Clay's Dig. 173, § 7.) But under the English law, if the widow married within the forty days, her privilege ceased. The language of the act in *magna charta, vidua maneat*, was construed to imply the condition of widowhood as essential to the feme's right of quarantine. See Bacon's Abr. 2d vol. 361; Thomas' Coke, 1st vol. 674; Law Lib. vol. 32, 234; 1 Lomax, 91. The rule for such a construction equally applies to our statute. The statute of Virginia on this subject is very like the statute of Alabama, and the statute of that State is construed to imply equally with the English law the continuance of the state of widowhood as essential to the feme's right. See Lomax, vol. 1, 91.

3. By the acknowledgment of a tenancy on the part of the defendants, and the payment of rent, the privilege of quarantine was waived. The privilege, if not terminated by the event of marriage, was in the nature of a chattel interest, and fell under the control of the husband. The husband could have removed his wife to another residence, and that would have put an end to the quarantine; for under the English law, if the widow left the capital mansion of her deceased husband, that destroyed her privilege. See Law Lib. vol. 32, 234.—The privilege being of such character, the husband, or husband and wife, could waive it, and the payment of rent was an expression of waiver.

4. The statute contemplates that the widow shall apply within a reasonable time for the assignment of her dower; otherwise, she being the proper person to apply for her dower, she could at will, in every instance, remain for life in the possession of the capital mansion of her deceased husband. The statute could not have contemplated that she might have at her option such an estate. And such seems to have been the view taken of a like statute in Tennessee. See Holman's Dig. 238, and the case referred to.

K. B. SEWALL, contra:

1. A widow has a right to the possession of the last residence of her deceased husband till dower is assigned her, and such possession is a bar to an action of ejectment. Clay's D. 173, § 7; 4 Kent's Com. 62; Doe v. Dodd, 1 Hals. 367; Inge v. Murphy, 14 Ala. 289, and cases therein cited; Robinson v. Miller, 1 B. Monroe, 88; Grimes v. Wilson, 4 Blackf. 332; Singleton's Heirs v. Singleton's Exr's, 5 Dana, 92.

2. The widow's *marriage* does not defeat or abridge her rights; she claims under the statute, and not by common law. See cases above cited, and Coulter v. Holland, 2 Harv. Rep. 330, 334. There is no exception or restriction in the act, and it cannot be assumed that the Legislature intended that the right should be confined to the state of widowhood. The argument, from the force of the term *vidua, ex vi termini*, if carried out, would wholly deprive the widow of any right to dower. And the other ground assumed as the reason for the forfeiture applies equally to a departure from the house as to the marriage. Now, a departure from the last residence has been held not to forfeit the widow's right. Inge v. Murphy, 14 Ala. 289.

3. The assignment of dower ought to be made by the heir, or the person entitled to the freehold. 2 Crabb's Real Pr. 92, § 1141; ib. p. 99, § 1159; 4 Kent, 62, 63; Stevens' Heirs v. Stevens, 3 Dana, 372. The act giving the widow a *summary remedy* for the assignment of dower was for her benefit, and does not impair the right of the heir or purchaser to assign dower at common law. This was held in Virginia, where a similar statute prevails. Moore & Wife v. Waller et al. 2 Rand. 421.

4. That a purchaser claiming under a deceased husband may go into equity for assignment of dower, is shown by the case of Wiseley v. Findleay et al., 3 Rand. 371.

5. The second husband's paying rent had no effect on his wife's rights; if he had conveyed to Shelton, it would not defeat her rights. Smith v. White, 1 B. Mon. 20.

CHILTON, J.—This was an action of ejectment, brought by the plaintiff in error against the defendant, Carrol, as tenant in possession of certain land described in the pleadings.—

Upon the trial in the court below, a bill of exceptions was sealed by the presiding judge, from which it appears that J. C. Synott and his wife were admitted to defend, and they entered into the usual consent rule as tenants in possession. The plaintiff having made out a title to the premises as the alienee of one James Hansford, the land having been sold under a mortgage made by said Hansford, it was proved that after the plaintiff acquired the title to the premises, said Hansford, who continued to occupy them, paid him rent for the same up to the time of his death, which happened in the autumn of 1843; that some time after said Hansford's death, his widow, who still remained in the possession of the land, intermarried with Synott, who also went into possession in right of his wife; and that said Synott, after the marriage, agreed to pay rent to the plaintiff at the rate of eight dollars per month, and did pay that sum for two or three months, but afterwards refused to pay the same. It was also made to appear that the defendant, Eliza Synott, late the widow of said James Hansford, was the lawful wife of said Hansford while he was seized of said land, and so continued up to the time of his death; that he left no children; that said widow married the present defendant in 1844. She had never released her right of dower in the premises, which included the mansion house, &c. where her said late husband dwelt next before his death.

The Circuit Judge instructed the jury, that "the widow was entitled to dower in the lands of which her husband died seized and possessed, and that if they believed she was in the possession of the dwelling house in which her husband most usually dwelt next before his death, that she was entitled to retain possession thereof, and of the whole lot on which it stood, free from molestation or rent, until dower was assigned her; and that if there was no evidence that she had relinquished her right of dower in the premises, and was rightfully in possession, the plaintiff could not recover in this action.— To this charge the plaintiff excepted, and now assigns the same in this court for error.

The statute under which the defendants hold, is in these words: "It shall be lawful for the widow to retain the full possession of the dwelling house in which her husband most usually dwelt, next before his death, together with the out houses,

offices or improvements, and plantation thereunto belonging, free from molestation and rent, until she shall have her dower assigned her." Clay's Dig. 173, § 7. It is insisted by the counsel for the plaintiff, that this statute does not confer upon the widow such an interest as will enable her to defend against an ejectment brought by the husband's alienee. This construction cannot be supported. The object of the statute was to protect the widow in the enjoyment of the homestead and the rents and profits accruing therefrom, until her dower was assigned, and to make it incumbent on those entitled to the fee, whether they be the heirs at law or purchasers, if they desired to obtain possession of the portion to which they were entitled in the real estate, to become themselves the actors to have the widow's dower assigned her. If they remain inactive and acquiesce in her possession, she is not subject to the payment of rent, nor to molestation. Until her dower is assigned, she holds the premises for an indefinite period, and may rent them out and appropriate the proceeds to her own use. Such has been the construction of this statute by this court, (see Murphy v. Inge, 14 Ala. Rep. 289,) and of other States having a similar statute. See the cases on the brief of the defendant's counsel; also Graham v. Graham, 6 Monroe, 562; Chaplin v. Simons' Heirs, 7 ib. 338; White v. Clarke, ib. 640.

It is, however, further contended, that if the widow were entitled thus to hold, she has forfeited this right by her subsequent marriage. In respect to the widow's quarantine, as the same was secured by the old law, this was doubtless true. It is said that before the conquest the widow had the right to remain in her husband's home a whole year after his death, within which time her dower was to be assigned her; but if she married before the year was out, she forfeited not only her dower, but whatever her husband had left her. But the privilege of quarantine, which permitted her to remain forty days in the husband's messuage or mansion-house, and which was confirmed by magna charta, ceased upon her marriage within forty days. The reason assigned is that the widow is then otherwise provided for, and her sorrowful condition, which exempts her from expedients to obtain, during that period, a maintenance, is supposed to be at an end. Bacon's Abr. title Dower & Jointure, B. 1, of Quarantine; Co.

Litt. 32, b. But the rigor of these ancient rules has given place to a more humane and enlightened policy, and however just may have been the construction of the English courts of the term "*vidua maneat*," employed in *magna charta*, restricting the privilege of quarantine to the condition of widowhood, we have not the remotest idea that the Legislature of this State ever contemplated the forfeiture of her right by a subsequent marriage. We have been unable to find any express adjudication upon this point by any of the courts of our sister States; but the cases are numerous where the husband has shared with his wife this humane provision of the law, and the fact of so general an acquiescence in her right is persuasive at least to show that her subsequent marriage does not work a forfeiture. It is but a statutory substitute for dower until it is assigned her, and if the subsequent marriage should work a forfeiture of the one, for the same reason the other should be forfeited also. No one, however, would contend that dower proper would be forfeited for such cause. Singleton's Heirs v. Singleton's Ex'rs, 5 Dana's Rep. 87, and 3d J. J. Marshall 48, affirm the doctrine above laid down of the widow's right to hold the premises rent free, until the assignment of dower. The construction of the statute contended for by the counsel for the plaintiff in error, would be in restraint of marriage, which the law ordinarily favors, and we do not feel authorised to adopt it, but the reverse, as consistent with public policy.— It is further agued, that the husband's vendee cannot proceed to have dower assigned to the wife, and therefore she must petition for it in a reasonable time, or be subject to ejectment. The argument cannot be supported. We think it very clear, the alienee of the husband may resort to a Court of Chancery to have the widow's dower assigned her, so that he may be let into possession of the remainder of the land. If he take the whole of the profits, he is in equity considered a trustee as to the widow's share. 8 Gill & Johns. 50; 3 Rand. 371.

As to the payment of rent by the defendant, Synott, to the lessor of the plaintiff, it is shown that such payment was merely gratuitous, and was doubtless made under a mistaken view of his rights. The relation of landlord and tenant did not in fact exist by any valid contract; Synott having the right with his wife to occupy the premises until dower was assigned to the

wife, the gratuitous payment of rent could not estop him from showing the true character in which he held the premises. He entered under no lease, but held in right of his wife, and although the payment of rent raised the presumption of a lease, it was but a presumption, and therefore liable to be rebutted.

We are unable to discover any error in the record, and the judgment of the Circuit Court must be affirmed.

MIMS & MIMS *vs.* STURDEVANT.

1. A father executes to his daughter, a married woman, a deed of gift for a slave, which does not create a separate estate in the wife, but vests the property absolutely in the husband: The husband, an illiterate man, believing that his marital rights are excluded, after the slave has remained in his possession some two or three months, refuses to let it remain longer; whereupon the wife sends the slave and deed to her father, informing him of the facts and requesting him to do the best he can for her: The father receives possession of both, saying that he would put the slave to work and account to his daughter for it, but died in possession of the slave more than six years thereafter, without a further recognition of the title created by the deed. *Held*—

I. That a charge, which assumes that the after possession of the father was in subordination to the title created by the deed, is erroneous, as withdrawing from the jury the consideration of the *quo animo* the possession was held.

II. That there was no error in refusing to charge that the return of the slave and deed to the father was a revocation of the gift.

Error to the Circuit Court of Monroe. Tried before the Hon. John Bragg.

The facts are stated in the opinion of the court.

Blount, for the plaintiff:

1. The plaintiff below showed no title to the slave for whose services hire is claimed. A deed of gift is a contract which, like all other contracts, may be rescinded by the consent of the parties thereto. The testimony shows a recission of the gift on the part of Sturdevant and wife, by returning the deed and negroes to the testator, (Britton Mims,) *by whom they were received.* This acceptance of the deed and slaves amounted to

an entire revocation of the original gift. Thompson v. Ward, 1 N. Hamp. 9; 4 Am. Com. Law, 274; Jackson v. Chase, 2 Johns. Rep. 84; Mason v. Grant, 21 Maine Rep. 160; McNulty v. Cooper, 3 Gill. & Johns. 219.

2. The evidence of the ownership of the slave was the deed. Parol evidence could not be received of its contents without accounting for the absence of the original. There was no evidence that it was lost or destroyed. If shown to be in the possession of plaintiff in error, upon notice and refusal to produce it, secondary evidence would have been admissible. If in the possession of a third party a subpœnea *duces tecum*, would compel its production. Smith v. Armistead's ex'rs, 7 Ala. Rep. 698.

3. The expression of the testator to the witness (Brown,) that "he would put the negro to work and account to Peggy something for it," was a mere gratuitous promise to do something for his daughter without consideration, and for which no action would lie. Hatchell v. Odom, 2 Dev. & Batt. 302. There is evidence showing that the slaves always remained in the possession of the testator until his death, after they were surrendered by the plaintiff. They therefore had neither the title, possession or right of possession. The declaration of the testator vested no title—was made to a stranger—did not relate to the slaves, and the "*something*" was a *mere intention* of compensation in some other way, for which no action would lie.

4. It is immaterial what were the terms of the deed, its recission or cancellation being shown. The defendants in error having once had the deed in their possession, are charged with a knowledge of their rights under it. A grantee is supposed to be conizant of the facts stated in his own instrument of title. Hudson v. Warner, 2 Harris & Gill, 415; Hale's adm'r v. Creswell, 12 Gill & Johns. 49, 50.

Cooper, contra.

DARGAN, J.—The defendant in error sued the plaintiffs in error, to recover hire for a slave that had performed labor whilst in their possession. The evidence showed that the slave belonged to the father of Mrs. Sturdevant, the plaintiff's

wife, who in December 1837, executed a deed of gift for the slave to his daughter, and delivered the deed and the negro to her. The negro remained some two or three months in the possession of the plaintiff, but believing that by the terms of the gift, he, the husband, had no right to the slave, he objected to her remaining longer on his premises, whereupon his wife sent the negro back to her father, and also the deed of gift, accompanied with a note informing him that her husband was unwilling that the slave should remain on his premises as she was not his property, and requesting him to do the best he could for her. On the return of the negro, the father of plaintiff's wife became excited, and threw down the deed and note, but said he would put the negro to work and account to his daughter something for it. The slave remained in the possession of the father from the time of its return in 1838, until his death in July 1845, and afterwards came to the possession of the plaintiff in error, but in what manner is not shown by the record. The cause however, has been argued as if they obtained the possession as the administrators of the donor, and we will therefore presume that they took possession of the slave in that character. The defendant in error, is an illiterate man, not able to read writing, and never heard the deed read. The deed was not produced, but the witness who deposed to its contents, stated that the deed conveyed the slave to the wife of the plaintiff and the heirs of her body. There was no proof to show that the father, in his life time, ever paid hire for the use of the slave, or recognized afterwards the title of his daughter or of the defendant in error. The court charged the jury, that whatever might have been the impression of the plaintiff in regard to the character of the gift, if in truth it was not a settlement upon the wife for her sole and seperate use, the husband acquired by the gift such property in the slave, as enabled him to recover in this action, notwithstanding the slave had been sent back to the donor.

We think the court erred in giving this charge. The question for the jury to determine under this evidence was, what was the character of the possession of the father of Mrs. Sturdevant after the slave was returned to him with the deed. Did he hold the slave for the use of the plaintiff, or did he hold the possession afterwads as his own. We admit that the

mere ignorance of the plaintiff of the right vested in him by the deed would not preclude him from asserting that title afterwards, if in the mean time he has not been divested of it, yet as he refused to suffer the slave to remain under his control, and his wife sent it and the deed back to her father, who retained possession of the slave for more than six years without ever afterwards recognizing the title created by the deed, it cannot be assumed as a legal proposition, that the character of the possession of the donor, was in subordination to the title created by the deed, or that he held the slave as a trustee. His possession may have been adverse to the title of the plaintiff; whether it was or not, depended under this evidence on the *quo animo* with which he held the possession. If the father of Mrs. Sturdevant considered the slave during the time he held possession, after the slave was returned to him as belonging to Mrs. Sturdevant, then his pessession was not hostile nor adverse to the title of the plaintiff. If however, he considered the slave as his own, and so held possession for more than six years, the title of the plaintiff would be defeated by the statute of limitations, and whether the possession of the father was adverse, or in subordination to the title created by the deed, was a fact under the evidence for the jury alone to determine. The charge, however, rendered it unnecessary for the jury to consider of this fact, but assumed as a legal conclusion, that the title of the plaintiff was not affected by this possession. In this the court erred.

We see, however, no other error in the ruling of the court. We think the charge that was requested, that the sending back the slave and the deed was a revocation of the gift was properly refused, for whether the gift was revoked or not, depended on the intention of the parties. This was a fact peculiarly for the jury under the evidence to determine, and the court correctly refused to assume it as a legal conclusion.

The judgment must be reversed, and the cause remanded.

MOORE *vs.* BARCLAY ET AL.

1. G., under a levy made before the expiration of his term of office as sheriff, and S. his successor, under subsequent levies of other executions, sold the lands of the defendant, of which M. became the purchaser at the sale made by G., and B. at that made by S. B. paid no money on his bid, but received a deed for the lands from S. and commenced an action against M. to recover possession: M. and B. compromised the suit by B. executing to M. a quit-claim to the land, and by M. confessing a judgment to B. for the amount of his bid at the sale made by S., with the understanding that this judgment was not to be enforced unless S. should be compelled to pay the amount of the bid to some creditor whose execution was in the hands of S. at the time of the sale, and should call on B. for reimbursement: M. then procured an assignment to himself of the only operative judgment and execution which could claim the money arising from said sale; and B. afterwards settled with S. the amount of the bid, by delivering up to him evidences of debt which he held against him, and caused execution to be issued on the judgment confessed by M. and levied on his property. *Held*—That on this state of facts a Court of Equity has jurisdiction of a bill filed by M. to restrain B. from enforcing said judgment; and that the answer of B. to such a bill, which merely denies that the judgment was confessed "upon the distinct agreement" alleged, is insufficient to authorise a dissolution of the injunction.

Error to the Chancery Court at Talladega. Before the Hon. David G. Ligon, Chancellor.

THE bill in this case was filed by plaintiff against defendants in error, and alleges, that on the 15th February 1844, he confessed a judgment in the County Court of Talladega in favor of the defendant, Barclay, for $1048, on which Barclay has had execution issued and handed to the sheriff, who has levied the same on slaves belonging to plaintiff, and will sell the same unless restrained, and that the judgment was confessed under the following circumstances: Executions had been issued upon certain judgments in favor of divers plaintiffs against William H. Moore, and placed in the hands of David A. Griffin, sheriff of Talladega county, and other executions in favor of different plaintiffs and against the same defendant had afterwards issued and been placed in the hands of Solomon Spence, the successor in office of said Griffin. Prior to

the time of his going out of office, Griffin had levied the executions in his hands on certain lands as the property of William H. Moore; and Spencer also, after he came into office, levied the executions in his hands on the same lands. Griffin and Spence both sold the lands, and plaintiff purchased at the sale of the former, and Barclay at that of the latter, at the price of $1,000, no part of which, however, was ever paid by Barclay. Barclay commenced an action against the tenant of plaintiff to recover possession of the lands, but before the trial term of the case, the said Barclay and plaintiff agreed between themselves that plaintiff should assume to Barclay a debt due to him from William H. Moore, the precise amount not recollected, and save him harmless against the bid made by him at the sale of Spence, whenever Spence should be called upon by any of the creditors, who had executions in his hands, for the proceeds of the sale, and in consideration therefor, Barclay dismissed the suit, and executed a quit-claim deed to the plaintiff for the lands. In pursuance of this agreement, the plaintiff assumed the amount due by William H. Moore to Barclay, and paid the greater portion thereof; and on the suggestion of Barclay, that, as he or Spence might be compelled to pay the money bid for the lands at any time when called on, and that he ought to be placed in a situation that would enable him to force it out of plaintiff as soon as it could be forced out of him or Spence, Plaintiff confessed the judgment, on which the execution now complained of has issued, with the distinct understanding that no money should be paid upon said judgment, unless the said Spence should be compelled to pay the amount of the bid by Barclay to some of the creditors whose executions were at the time of the sale in Spence's hands, and should call on Barclay for the amount of his bid. The bill further alleges, that a contest arose among the creditors whose executions were in Spence's hands, as to the proceeds of sale of the lands mentioned in the bill, and other lands of the defendant William H. Moore sold at the same time, and it was decided eventually in the Supreme Court, that the execution in favor of one Campbell, use, &c. against Wm. H. Moore and one Chandler should be first paid, but that said Campbell was subsequently, on bill filed by said Chandler, perpetually enjoined from collecting said execution: that the Branch Bank

at Montgomery was also a judgment creditor, whose execution was in the hands of Spence at the time of said sale, and that its execution which amounts to more than the bid of Barclay, is entitled to the proceeds of the sale, and that the plaintiff is by purchase from the Bank, the assignee of said judgment and execution, and is the person who alone is entitled to call on Spence or Barclay for the amount bid at said sale, all which facts are well known to Barclay: that Spence is insolvent, and since he has become so, there has been a pretended payment to him by Barclay of said bid, but the plaintiff charges that no money was paid thereon, and that the settlement was made by Barclay giving up to Spence evidences of debt which he held against Spence and had held for several years, &c.

The bill prays a perpetual injunction of said judgment and that defendant Barclay be temporarily enjoined from enforcing its collection, the latter of which was only granted, &c.

The answer of Barclay admits that the plaintiff confessed the judgment but for $1048 15-100 instead of the amount named in his bill, and that execution has issued and been levied as alleged. It states that after his purchase at the sale of Spence and the institution of the suit for the recovery of the lands, plaintiff and himself made a verbal agreement by which plaintiff agreed to pay him the amount of his bid at the sale which was $917 12-100, and also to pay all the debts due by said William H. Moore to him, Barclay, and to Barclay, Stinnelt & Co., and he on his part agreed, that if plaintiff did so, he would execute to him a quit claim deed for the lands: that in pursuance of said agreement he executed to plaintiff a quit claim deed for a portion of the lands, and some time afterwards upon the representation of plaintiff that he was unable to make the payments in accordance with the agreement, and upon his request that defendant would indulge him longer and also execute a quit claim for the balance of the lands, which he, plaintiff, had already contracted to sell, defendant executed the quit claim deed to the balance of the lands, liquidated with him the debts owed to Barclay and to Barclay, Stinnelt & Co. and took from him the confession of judgment for the amount of his bid with interest thereon. The defendant denies that plaintiff confessed said judgment "upon

the distinct agreement" that no money should be paid on said judgment, unless the said Spence should be compelled to pay the amount bid by defendant at the sale of said land to some of the creditors, whose executions were in Spence' hands against William H. Moore at the time of the sale of the lands: no such agreement was made by defendant with said plaintiff as is incorrectly alleged in said bill, nor was any other agreement made with him than the one above set out in relation to said confessed judgment: that at the time of this agreement, defendant informed plaintiff, what was then really true, that he had not paid Spence the amount of his bid, but had promised to do so whenever he called on him for it, and this was the reason why he wished the confession of judgment: that he does not know whether plaintiff is the owner by purchase of the judgment in favor of the Bank: that after Spence became notoriously insolvent, to wit, on the 21st September 1846, a judgment was rendered in favor of John F. Tompkies against said Spence and defendant as his security on a note, for nine hundred ninty-nine dollars and eighteen and three-fourths cents, which defendant paid off on the 14th Jan. 1847, under an arrangement with said Spence, that this payment was to go towards the discharge of the amount of said bid, and the balance of the bid, with interest to be calculated on it was to be credited on debts due by Spence to defendant, &c.

Upon the coming in of the answers of Barclay and Spence, the latter of which was excepted to, a motion was made before the chancellor in vacation to dissolve the injunction, which motion was sustained and the plaintiff entered an appeal therefrom and now assigns it as error.

L. E. Parsons, for plaintiff.

Rice & Morgan, for defendants.

COLLIER, C. J.—The bill certainly states a case of which a court of chancery may take jurisdiction. It alleges a contract between the complainant and Barclay in positive terms under which the former confessed the judgment, and avers that it has been violated by Barclay, in causing an execution to be issued on that judgment though Spence was not called on for payment by any of the creditors whose executions were

entitled to the proceeds of the land which Barclay bid off. The allegations of the bill are explicit, that the quit claim deed was executed to the complainant upon his assumption to pay Barclay a debt due him by W. H. Moore, and the confession of the judgment to be paid when the execution creditors who were entitled, should call on Spence for payment. It is alleged that the debt of W. H. M., has been assumed and the greater part of it paid: that no requisition has been made upon Spence, and none can be made, as the complainant is assignee of the Branch Bank at Montgomery of the only judgment and execution now operative, which was in his hands at the time the land was sold.

It is supposed that these facts, even when coupled with the insolvency of Spence are insufficient to sustain the jurisdiction, but it should be also alleged that the sureties in the official bond of Spence were insolvent, so that the complainant could not enforce the payment of the judgment of which he is assignee either by motion or suit against them. This argument we think cannot be supported. The complainant seeks relief upon the ground that his contract with Barclay has been violated by the attempt to enforce a payment of the judgment in favor of the latter by execution. If the event has not occurred upon which an execution could rightly issue, the complainant must have some remedy, by which he can arrest it. Here, the objection does not embrace matter arising subsequent to the rendition of the judgment, but rests upon an agreement previously entered into, which induced its confession; and in addition to this, a perpetual injunction is prayed upon an allegation of facts showing Barclay should not be required to pay Spence, and if he does, the money may be immediately demanded by the complainant under the execution, of which he is assignee. In this view of the case, it is clear that the relief sought cannot be afforded by a *supersedeas* and a consequent motion to quash. Lockhart et al. v. McElroy, 4 Ala. Rep. 572. A court of equity is alone competent to furnish a complete remedy by making a definitive adjustment of the rights of the parties, and to entitle the complainant to relief in this tribunal, it must in the posture of the case made by the bill be an immaterial inquiry whether Spence and sureties are able to respond to the demand which the complainant might im-

mediately make, if he were to satisfy Barclay's judgment. It is quite enough in resisting the enforcement of that judgment for him to stand upon his contract.

The discharge by Barclay of Spence from the payment of certain demands due upon their private dealings cannot be recognized as a satisfaction of the bid of the latter. If Spence returned the executions satisfied, upon proof of these facts, the court from which they issued would cause the return to be vacated. The mandate of a *fieri facias* requires the money to be made, and it is not complied with, if the officer to whom it is entrusted receives demands against himself in payment. Cook & Lamkin v. Bloodgood, 7 Ala. Rep. 683. If then, the allegation of the bill upon this point be true, Barclay can claim nothing from the settlement he made with Spence, and the event upon which he can enforce his judgment against the complainant not having happened, his execution should be enjoined.

It would operate great injustice to the securities of Spence, if Barclay should be allowed to satisfy his purchase of the land in the manner alleged in the bill, and thus make them liable to the complainant. Indeed it may well be questioned whether they are obliged to acquiesce in such an adjustment, or whether they could not coerce a payment in money from Barclay, if necessary to their own protection. But however this may be, the complainant we have seen may still treat the matter as open between Barclay and Spence.

Thus far we have considered the case upon the bill alone, we will now enquire whether its essential equity is denied by the answer of Barclay. This defendant denies that the judgment was confessed "upon the distinct agreement" that no money should be paid, or execution issue and be levied thereon, unless he should be compelled to pay the amount which he bid at the sale by Spence to some of the creditors of W. H. M., whose executions were in his (Spence') hands. He does not know that the complainant is the assignee or proprietor of any judgment or lien which the Branch Bank at Montgomery may have owned, and therefore calls for proof of the bill on this point. It is admitted however, that the defendant did not pay Spence the amount of his bid for the land until several years after the complainant's purchase, and the pay-

ment was not made in money, but as follows: In the fall of 1846, a judgment was rendered in favor of Tomkies against Spence and Barclay as his surety, for nine hundred ninety-nine dollars and eighteen and three-fourth cents including costs, founded on a note given by the former as principal, and the latter as his surety. By agreement between Spence and Barclay, the latter satisfies Tomkies' judgment, and discharges Spence from the payment of certain sums which he was owing him, Barclay, and his partner, all which amounted to a sum equal to that at which Barclay bid off the land at the sheriff's sale, with interest thereon, and in consideration thereof Spence discharged Barclay from the payment of the purchase money for the land.

It is needless to enquire what would be the rights of the parties in a court of law, conceding as he must do upon a motion to dissolve the injunction the truth of the answer, so far as it negatives the allegations of the bill. In undertaking to execute to the complainant a quit claim deed to the land in the manner, and for the consideration expressed in his answer, Barclay impliedly affirmed, not only that he had bid it off and had the sheriff's deed, but that he had paid for it so as to make his deed operative against W. H. M., and the parties whose executions were in the sheriff's hands when the sale was made. The acceptance by the complainant of a deed for a part of the land after Barclay informed him that he had not paid Spence, but had promised to do so whenever required, did not relieve Barclay from making such payment, if he would make the contract obligatory upon the complainant, at least to the extent of money due to the sheriff. It may be that if a sheriff receive in payment of an execution a discharge from a debt owing by himself to the defendant, that the sheriff and his sureties are estopped from showing that it was not paid with money. But however this may be, the plaintiff is not bound to resort to his remedy against the sheriff and his sureties, but may move to vacate the return of satisfaction and have another execution issued and levied, or if its predecessor had been levied on property which had been thus sold and paid for, he could cause the execution to be levied and the property resold. If the law were not so, the plaintiff might lose his debt if the sheriff and his sureties were insolvent.

The execution is the sheriff's warrant, it is in the nature of a special authority, and we have seen it requires him to make the sum collectable in money, and does not authorise him to receive something else as an equivalent; if he does so, his act is beyond the scope of his legitimate powers, and may be avoided at the election of the plaintiff in execution.

The allegation that the complainant is the assignee of a judgment and execution which entitles him to the money which Barclay should pay Spence in order to consumate his purchase, is not denied, so as to authorise the conclusion upon the motion to dissolve the injunction, that it is untrue. If then we look to the contract alone, Barclay should not be allowed to enforce his judgment, because he has not perfected his purchase so as to acquire any title. This we said he was bound to do by the payment of the sum at which he bid off the land. The assignment under which the complainant claims, makes him in equity a creditor by judgment and execution, and entitled to all the privileges and advantages which one thus situated may exercise. We have seen that it would be competent for him to move to vacate the sale to Barclay, because no such payment has been made as the law recognizes. If he could do this, why should he be compelled to pay Barclay the confessed judgment when he will not thereby perfect his title. Having notice of the manner in which Spence was paid, if all creditors were out of the way, could not W. H. M., object to the validity of the sale by the sheriff, and even assert his title against the complainant. Again: supposing the complainant should pay Barclay, he could not re-sell the land under his execution, without losing the land, or what he had thus paid. And if Spence and his sureties were insolvent, would he not lose either the amount paid his execution, or the land, as W. H. M. could not be called on a second time to satisfy the execution. It may perhaps also be asked whether the sureties of the sheriff if they were required to satisfy the complainant's executions have not equitable rights, which entitle them to be subrogated to all securities the complainant may make available, and if he were to yield up the right to enforce satisfaction from the land, could not the sureties in a court of chancery insist that they should be discharged *pro tanto*. These are questions, which the decision of the case as now present-

ed, does not make it necessary to solve, yet they are suggested by the record, and may be wothy of consideration in the progress of the cause.

Viewing the complainant as a creditor of W. H. M., by judgment and execution, which entitle him to the money that Spence should have collected of Barclay, as well as a purchaser from Barclay, and we are clearly of opinion, that the judgment against the complainant should not be enforced. We have stated the grounds upon which this conclusion is rested sufficiently to make ourselves understood. A court of equity is competent to consider the case as it may be deduced from the pleadings and make such a disposition of it as will effect complete justice according to law.

We have not thought it necessary to consider whether the notice of the motion to dissolve the injunction should not have designated the place at which it would be made before the chancellor, or whether this court will regard an irregularity in the notice, on appeal from the order of dissolution as an available error. Be this as it may, we have seen that the injunction should not have been dissolved. But even if the act requiring a notice, is merely directory (a point upon which we express no opinion,) we incline to think that a correct practice requires that the notice should be so precise as to inform the complainant when and where the motion will be submitted.

We have not done more than merely look into the answer of Spence, as it had no influence upon the decision of the chancellor, there being exceptions to it which were undecided. But our impression is that it contains nothing, if the exceptions were disposed of, that would induce a result more favorable to the defendant. We however leave all questions which may arise upon it for future consideration. We have but to add, that the order dissolving the injunction is reversed, and the cause remanded.

Chilton, J., not sitting.

HARRISON *vs.* POOL.

1. P., who was never married to, but lived with an illegitimate daughter of R. B. H., had charge in South Carolina of certain slaves as his overseer, which he afterwards for fifteen years held possession of in this State, claiming and controlling them as his own. R. B. H. within this time lived in the immediate neighborhood of P., and repeatedly spoke of the slaves as P.'s property, but when about to die executed a will, bequeathing them to P. in trust for the benefit of certain other slaves whom he attempted to manumit. The will, at the drawing up of which P. was present and gave the names of most of the slaves so bequeathed, required that he should, before he assumed the execution of the trust, enter into bond for its faithful performance. After the death of R. B. H. and the probate of the will, K. H., one of the distributees of the estate, was appointed administrator with the will annexed, and demanded the slaves from P. P. surrendered them to him, and he kept them for two years, when they were distributed under an order of the Orphans' Court, and some of them carried to other States, P. having actual notice of the Orphans' Court proceedings and of the consequent division of the slaves, and making at the time no objection to either. *Held*—I. That in a suit by P. against K. H. for the recovery of the slaves, it was not competent for him to prove that before he surrendered the slaves, J. H., one of the distributees, told him that if any of them fell to his share he would make him "a compliment" of them;—II. That the record of the proceedings in the Orphans' Court touching the distribution of the slaves was admissible evidence for K. H.;—III. That a receipt from P. to the administrator for "all demands in full against the estate," if he claimed under the will, was relevant, but, if he claimed by independent title adversely to the estate, irrelevant testimony;—IV. That it was competent for K. H. to prove the application of P. to the Register in Chancery to enter into the bond required by the will, as conducing to show that he considered the slaves as passing by it.
2. Where the possession of property is acquired and held for a time in subordination to the title of another, to render it adverse, there must be a disclaimer of the original title and an actual hostile possession of which the true owner had notice, or which is so ostensible and notorious as to furnish a reasonable or *prima facie* presumption of notice.
3. An adverse possession of personal property for more than six years gives a complete title, without reference to the intention or understanding of either or both of the parties at the time of its delivery.
4. If P. having the title to slaves, recognises the right of R. B. H. to dispose of them by will, and upon a demand by the personal representative of R. B H. surrenders them to him, and with actual notice of all

the proceedings, stands by and suffers them, without objection on his part, to be divided, under an order of the Orphans' Court, among the distributees of the estate, and carried by them into other States, he is estopped from setting up against such personal representative any claim for or on account of said slaves.

Error to the County Court of Dallas. Tried before the Hon. A. J. Saffold.

DETINUE for a number of slaves by defendant against the plaintiff in error, who was the administrator with the will annexed of Richard B. Harrison, deceased, and also a distributee of his estate. The slaves in controversy belonged to the decedent in South Carolina, and were in charge of the defendant in error as his overseer. The latter lived with an illegitimate daughter of the decedent as his wife, but they were never married. The decedent and defendant in error removed from South Carolina to this State, and the slaves after the removal remained in the possession of the defendant for some fifteen years, and were worked by him on lands which were said to belong to the decedent and were situated near his residence. During the time defendant had the slaves in possession, he publicly and notoriously claimed and treated them as his own, and the decedent repeatedly spoke of them as the defendant's property. Just before the decedent's death, he executed a will, by which he bequeathed said slaves to the defendant, in trust for the benefit of other of his slaves whom he attempted in his will to manumit, and required that the defendant should, before he assumed the execution of the trust, enter into bond for its faithful performance. The defendant was present when this will was made, and gave to decedent the names of the slaves so bequeathed. After the decedent's death, the plaintiff in error as his administrator demanded the slaves of the defendant, who surrendered them to him. The plaintiff kept them in possession about two years, and they were then distributed under an order of the Orphans' Court, the distributees executing to the administrator refunding bonds, and some of them, who resided out of this State, took the slaves allotted to them along with them. The defendant proved that one of the distributees of the estate informed him, before he surrendered the slaves to the administrator, that if

any of said slaves sued for should fall to his (the distributee's) share, he would make him "a compliment" of them.—The plaintiff objected to this testimony, but the court refused to exclude it. The plaintiff proved actual notice to the defendant of the proceedings in the Orphans' Court touching the distribution of the slaves, and of the division made under it, and that he took no steps in opposition to it, and in connection therewith offered in evidence a transcript of said proceedings in the Orphans' Court, to which the defendant objected, and the court refused to allow it to go the jury. The plaintiff also offered to read in evidence, after first proving the signature, two receipts given by the defendant to the plaintiff in error whilst said slaves were in the possession of the latter, by the first of which he acknowledged to have received from him as administrator "all the demands in full" which he had against the estate, and by the other "all the notes and accounts" which the estate had against him, and which were given up "according to the request" of the deceased, and proved that at the time the will was drawn the deceased said to the defendant that there were various demands between them, and he believed defendant would fall in his debt on a settlement, but that he wished no claim made upon him, and that no claim should be made by either party against the other, to which the defendant then agreed. The defendant objected to the reading of the receipts, and the court sustained the objection. The plaintiff further offered to read in evidence an entry on the minutes of the Register in Chancery at Cahawba, in the following words, having first proposed to prove it by the Register: "Before the Register, this 28th May, A. D. 1844: in the matter of the trusteeship under the will of Richard B. Harrison. This day came before the Register Ephraim Pool, appointed trustee under the will of Richard B. Harrison, deceased, and applied to give bond and qualify as such trustee, which application is refused by the Register." It was shown that this application was not made by the defendant in person, but by his attorney with his knowledge and consent. The defendant objected to the reading of this entry, and the proof proposed to be connected with it, and the court refused to let it go to the jury.

The court charged the jury, that if Pool had just reason to believe and did believe that Harrison intended the negroes for

his benefit, and under this belief held them, openly using and claiming them as his own, this would be such an adverse possession as would ripen into a title in six years; but that if they believed that Pool acquired the possession of the slaves from said Harrison as a loan, and that such was understood to be the character of his possession both by himself and Harrison, no length of time would ripen his possession into a title. The defendant below asked the court to charge the jury, that whether it was a gift or loan depended on the intention of Richard B. Harrison, and that if Pool was in doubt as to what his intention was, it was his duty to inquire and ascertain such intention, which charge the court refused to give. He also asked the court to charge that the plaintiff is not entitled to recover in any event except for the slaves in the defendant's possession, which charge the court refused, and instructed the jury that it was immaterial whether the defendant had the slaves in possession or not at the time the suit was instituted, provided he had them in possession at any time before.

To the several rulings of the court, to the charges given, and to the refusal to give the charges requested, the defendant excepted, and now assigns them as error.

HUNTER, for plaintiff in error.

G. W. GAYLE, for defendant.

CHILTON, J.—This was an action of detinue, brought by Pool against the plaintiff in error to recover certain negro slaves described in the pleadings. There was a verdict for the plaintiff below. Upon the trial a bill of exceptions was sealed by the presiding judge, which sets out the proof *in extenso*, and upon which the errors are assigned in this court.—There was proof conducing to show that the slaves in controversy had belonged to Richard B. Harrison, who had at one time resided in South Carolina, where the defendant in error had been an overseer for him and in charge of said slaves in that capacity: That afterwards, and for some fifteen years prior to the institution of this suit, the defendant in error claimed said slaves as his own, and repeated declarations of Harrison were proven, by which in speaking of said slaves, he mentioned them as "Pool's negroes;" that after their removal to

this State, Pool remained in possession of the slaves, but resided on land said to be owned by said Harrison, and situated a few miles distant from his residence; and that Pool occasionally lived with the reputed illegitimate daughter of Harrison as his wife, but was never married to her. It was further shown in the proof, that Harrison a short time before his death made a will bequeathing these slaves to Pool, in trust for the benefit of certain other slaves, whom he attempted to manumit by his will; that Pool was present at the time of his making this will, and gave him the names of the slaves so bequeathed, and made no objection; and that the provisions of the will required Pool, before he entered upon the execution of the trust, to enter into bond for its due performance. This will was admitted to probate. After the death of Richard B. Harrison, the plaintiff in error administered upon his estate and demanded the slaves of Pool, who surrendered them to him, and after keeping them some two years, a division of said Richard B. Harrison's estate was made, and these slaves were apportioned with the other property, by the order of the Orphans' Court, among the several distributees of the estate, who gave the usual refunding bonds to the administrator, and some of them, residing without the limits of this State, took their portions of said slaves with them.

In the court below, Pool, the plaintiff, was allowed to prove by John Harrison, one of the distributees, that he, the witness, had informed said plaintiff, previous to his surrendering the slaves to the administrator, that if any of said slaves should fall to his share, he (to use his own words) would make "a compliment" of them to said plaintiff. It is insisted by the defendant in error, that this proof was properly admitted as showing the inducement of Pool to give up the slaves, and explaining the *quo animo* he parted with them. The argument does not sustain the position. The administrator, who is the plaintiff in error, and to whom the property was delivered, was neither party nor privy to the conversation. It is not even shown that he had knowledge of it before the distribution of the property by the order of the Orphans' Court. Upon what principle then can he be injuriously affected by the promises or declarations of a third party, with whom he had no connection in any way whatever? We cannot conceive how such

proof can be admitted legally against him. The declarations were not made at the time of the delivery, so as to constitute a part of the *res gestæ*, and although they would doubtless be received as evidence in a suit by Pool against John Harrison, the witness, they are as to the administrator *res inter alios*, and clearly inadmissible. Redman v. Roberts, 1 Iredell's Rep. 479; Hanberger v. Root, 6 Watts & Serg. 431; Perry v. Graves, 13 Ala. Rep. 246.

The record of the Orphans' Court, which the court excluded, and which showed a distribution of the property sued for among the distributees of the estate, was clearly admissible as evidence. It was offered in connection with proof, showing that the plaintiff below was fully apprised of the proceedings which it recited, to show that the slaves then in defendant's possession had been allotted to him upon a distribution of the property of the estate, and thus to make out his title. Pool having upon the administrator's demand of the property delivered it up to him as assets of the estate for distribution, notwithstanding he may have been assured by some of the distributees that they would relinquish to him whatever share of said property might fall to them, could not hold the administrator responsible for the slaves which had by order of the court been distributed and thus placed out of his possession and beyond his control. The proof should have gone to the jury, so that they might determine whether the distribution which it evidenced was not in accordance with and a consummation of the intention of Pool in making the surrender, and to show that the administrator had been legally divested of a portion of the slaves for which he was sought to be charged. The record showed the action of the court and of the administrator predicated upon the conduct of Pool in surrendering the property, and that the slaves then in the defendant's possession had been allotted him as one of the distributees of the estate. Suppose that the whole of the slaves had been allotted to the defendant, and the other distributees had received an equal number of the slaves of the estate about which there is no controversy, should not the defendant be allowed to say in answer to Pool's demand for the slaves of him—"You placed them in the hands of the administrator of the estate as assets for distribution—that distribution has been

made, they have fallen to me as my portion of the estate, and I have never either directly or indirectly acknowledged your claim, nor consented to yield to you my proportion of said slaves; and since as a consequence of your act in surrendering the slaves and in consummation of the purpose for which the surrender was made the slaves are allotted to me, you shall not be allowed to take advantage of your admission to my prejudice." We think it very clear that the record of the distribution of the property, connected with Pool's surrender of it to the administrator for that purpose, was legitimate and should not have been rejected.

If Pool had claimed the slaves under the will of Richard B. Harrison, then the receipt from him in full of all demands given to the administrator would certainly have been relevant testimony as conducing to show that he had no claim or right of action against the estate. The word "demand" would certainly embrace the claim which he might assert against the estate for the slaves, as according to Lord Coke, it is the most comprehensive term known to the law except the word claim, and a release of all demands releases "all mixed actions, a warranty, which is a covenant real, and all other covenants whether real or personal, conditions before they are broken or performed, and after annuities, recognizances, obligations, contracts," &c. Coke Lit. 291, b. If however he claimed the slaves, independent of the estate and by title adverse, then it is equally clear that the receipts were wholly erelevant and inadmissible.

The County Court also erred in rejecting the record of Pool's application to the Register of the Chancery Court to give bond, according to the will of Richard B. Harrison, as preparatory to his entering upon the trust which he supposed the will created. This proof was condusive to show that he considered the property as passing by the will, and in connection with the proof of his presence when the will was made and his having furnished the testator assistance in its execution, was proper for the consideration of the jury. If the application was made by counsel as a mode of obtaining possession of the slaves, and not for the purpose of acquiescing in the title which is asserted by the will, and Pool was merely induced to resort to the remedy upon the advice, that

he would be entitled to the absolute property in the slaves, if he could obtain them in that way, this would go far to destroy the effect of such evidence, but would not render it incompetent. The jury should determine upon the weight which it should have as an admission by Pool of property in the testator.

As this case will have to go back, it is proper that we should briefly state the law arising upon the charges which were asked and refused in the court below, and also upon those given, as a guide for the future conduct of the cause. Adverse possession is a question of fact, to be determined by the jury, according to the rules which the law prescribes. Where the possession is acquired and held for a time in subordination to the title of the true owner, then, to constitute an adverse possession, there must be a disclaimer of the original title, and an actual hostile possession of which the true owner had notice, or which is so ostensible and notorious as to furnish a reasonable, or *prima facie* presumption of notice. If Pool held the property adversely as above stated, it is wholly unimportant whether at the time it was delivered, Richard B. Harrison considered the property as loaned to him or not, for if Pool esteemed the property as having been given to him, and under that belief, asserted claim to it, as his own and held it notoriously adverse, his possession after the expiration of six years, from the commencement of such adverse possession, would ripen into a complete title, errespective of the intention of Richard B. Harrison. So also, if the property had been originally loaned, and so understood by both parties, but Pool afterwards disclaimed the title of the lender, and held adversely under such circumstances as to charge the lender with notice of his disclaimer and adverse possession, the property would vest in him after the expiration of six years from the commencement of the adverse possession. It is laid down generally, and we think correctly, that an adverse possession for a length of time which makes out a title under the statute of limitations, may be set up against any title whatever. Bradstreet v. Huntingdon, 5 Peters, 438; Jackson v. Deffendorf, 3 Johns. Rep. 267; Angel on Limitation, 396, and note 1, (2d edit.) See also Kitty v. Fitzhugh, 4 Rand. 600; Ratrie v. Saunders, 2 Har. & John. 327; Callis v. Tolson, 6 Gill. & John. 90; Smart v. Baugh, 3 J. J. Marshall, 363.

In this case the property was delivered to the administrator as assets of the estate for the purpose of having the estate settled, and the question was presented in the court below, whether the administrator was liable in this action of detinue for the property which had, under the order of distribution, gone into the hands of the other distributees of the estate. We need not discuss the question, whether if a bailee dispose of property in accordance with the terms of the bailment, and in ignorance of the rights of a third party, he can be made liable in an action of detinue for the property thus disposed of. Lee v. Matthews, 10 Ala. Rep. 682; Pool v. Adkinson, 1 Dana's Rep. 110. But confining our opinion to the law arising upon the facts of the case before us, we feel quite sure that if the property was delivered up by Pool upon the administrator's demand, as assets of the estate of Richard B. Harrison, and Pool did not at that time, nor at any time previous to the distribution of the property among the several distributees by order of the Orphans' Court, assert or make known his claim to the administrator, then he is estopped from setting up such claim. The rights of third parties, who have acted upon the admission which his relinquishment implies, have become vested, the settlement of the estate so far as a distribution of the property is concerned, has been based on such admission; the other distributees have received their portion of the property, and to hold the administrator liable in detinue, or any other action for the slaves thus voluntarily surrendered and distributed by a court of competent jurisdiction would equally oppose the principles of law and the plain dictates of justice. It would be to make the administrator responsible for the plaintiff's own folly in delivering up property as belonging to the estate which really belonged to him; and a further consequence of the plaintiff's recovery would be to overturn the proceedings of the court distributing the slaves, and to involve the estate in another settlement after the slaves shall have been restored, or to turn the administrator round to his action upon the refunding bonds which he had taken of the distributees for his indemnity. See as to estoppel, Robison v. Coker 11 Ala. Rep. 472; Gamble v. Gamble's adm'r, ib. 976, and cases cited from 3 C. & P. 136. See also the numerous authorities collated in 1 Sup. U. S. Digest, 566–7;

2 U. S. Digest, 205; 2 Phil. Ev., note 192, p. 199, *et seq.*— If, as the proof indicates, Pool was induced to surrender the slaves upon an assurance of some of the distributees that he should have as a donation whatever share of the slaves might fall to them, we will not say he could not recover from the party making such promise the share allotted to him; but it is not pretended, as we have before stated, that the plaintiff in error made any such promise, or knew that any one else had done so. As to him, then, the doctrine of estoppel *en pais* applied. It follows that the charge asked by the defendant below, under the facts of this case, "that the plaintiff could not recover in any event except for the slaves in the defendant's possession at the commencement of the suit," was more favorable to the plaintiff against whom it was asked than the law would warrant, and should have been given.

It is unnecessary to examine the other points raised, as it is not probable they will arise on another trial.

Judgment reversed, and cause remanded.

REPORTS

OF

CASES ARGUED AND DETERMINED

AT THE

JUNE TERM, 1849.

LECATT *vs.* THE MERCHANTS' INS. CO., MOBILE.

1. The Writ of Right at common law, or as recognised by statute in this State, does not lie in favor of a tenant by the curtesy.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

JONES & CUTHBERT, for plaintiff:

1. The writ of right, strictly so called, lies only in favor of one who claims a *fee simple estate.* But *other writs,* called *writs in the nature of writs of right,* lie to recover lands by persons claiming a free-hold less than a fee simple. 3 Black. Com. 193. Thus such a writ lies to recover *dower*—an estate strikingly analogous to curtesy. Roscoe on Real Actions, 29. It is laid down that a tenant by curtesy is entitled to the writ of *cessavit,* which is itself a writ in the nature of a writ of right. Ros. on Real Ac. 33. So where tenant in dower or *by curtesy* has lost his land by default in a possessory action, he can recover it by a writ *quod ei deforceat,* which is a writ in the nature of a writ of right. Roscoe on Real Actions 132; 2 Fitzh. Nat. Brev. 155–56. These analogies and authorities

show that the tenant by the curtesy is entitled to this writ. If it should be denied him, then there would follow the anomaly of a right without a remedy, which the law does not easily allow. 3 Black. Com. 192.

2. This court in the late case of Henry and wife v. Thorpe, 14 Ala. Rep. 103, has decided that the writ of right is an existing remedy in Alabama, and the same reasoning used in that case shows that the other writs in the nature of writs of right also exist in our laws.

CAMPBELL, contra:

1. The question in this cause is whether a tenant by curtesy can maintain a writ of right. The nature of the plaintiff's title appears in the declaration, and the question is presented to the court by the judgment on the demurrer. 3 Black. Com. 193, 194; Ros. on Real Act. 22, 176; 28 Law Lib. See for the different forms of the writ of right, Roscoe on Real Act. 3; 1 Fitz Herb. Natura Brev. 5.

CHILTON, J.—The plaintiff in error brought his writ in the nature of a writ of right, demanding as tenant by the curtesy certain real estate in the city of Mobile. The declaration was demurred to, and the court below sustained the demurrer, and gave judgment against the demandant for the cost, to reverse which judgment he brings the case to this court.

The question for our decision is, whether the tenant by the curtesy is entitled to the remedy resorted to in this case to recover his estate.

The writ of right, which, though it is recognized by our statute, has been rarely resorted to in this State, lay at the common law according to Judge Blackstone, principally in four cases: "1. Upon discontinuance by the alienation of tenant in tail, whereby he who had the right of possession had transfered it to the alienee, and therefore his issue, or those in remainder or reversion shall not be allowed to recover by virtue of that possession, which the tenant hath so voluntarily transfered. 2–3—In case of judgment given against either party, whether by his own default, or upon trial of the merits in any possessory action; for such judgment, if obtained by him who hath not the true ownership, is held to be a species

of deforcement, which however binds the right of possession, and suffers it not to be ever again disputed, unless the right of property be also proved. 4—In case the demandant who claims the right is barred from these possessory actions by length of time, and the statute of limitations. In these four cases the law applies the remedial instrument of either the writ of right itself, or such other writs as are said to be of the same nature." 3 Black. Com. 191. But this writ only lay for such as claimed to be tenants of the fee simple, and it is said "if the owners of a particular estate, as for life, in dower, by the curtesy, or in fee tail, are barred of the right of possession by a recovery had against them through their default or non appearance in a possessory action, they were absolutely without any remedy at the common law;" ib. 193. The statute of Westminster 2, 13 Edw. 1, c. 4, gave a new writ to such persons, after their lands had been recovered against them by default, called a *quod ei deforceat*, which partakes somewhat of a writ of right, and enabled him who had been deforced by his default to regain the right. This remedy, it seems was confined to the particular case provided for, viz, the recovery against the demandant in a possessory action by *default or non appearance*, for where the party made defence and recovery was had against him, he was not entitled to this statutory remedy. It is also said, that a tenant by the curtesy is only entitled to this writ by the equity of the statute not being specially named therein. Roscoe on Real Actions, 132; 28 Law Lib. 94. Neither was this writ technically considered in the nature of a writ of right, but was a writ of entry, and is so classed by Mr. Roscoe, page 88. But it is unnecessary for us to consider this writ, which was conferred by the statute, since we have no statute which authorises it, and being unknown to the common law, it cannot be considered as of force here.

It is true, as is stated by the counsel, that for every right there is a remedy, (3 Blackstone's Com. 192,) but this maxim of the law does not imply that a party may not lose his remedy and consequently forfeit his right by his laches, by his failure to avail himself of the remedy which the law affords within the time prescribed by the statutes. By our law, a party claiming as tenant by the curtesy, has his remedy by the or-

dinary action of ejectment, or trespass to try title. Rochon v. Lecatt, 1 Stewart's Rep. 609. And if he fail to bring his action within the time, which the statute prescribes as a bar to these remedies, he must lose his estate. As the common law gave the plaintiff no remedy, not being entitled to the writ of right or any writ in the nature of a writ of right, and as we have no statute similar to 13 Edw. 1 c. 4, it follows that the action in the present case cannot be maintained. It is true that by the common law, the widow was entitled to her writ of right of dower, when no part of her dower was assigned her, and that the nature of her title is very similar to that of curtesy, both being estates for life, and requiring a present seizin in law or in deed in the owner of the inheritance, whose death consummates the title which the marriage rendered *initiate*. Still, however, there was a difference. The estate of one is said to be in the *post*, the other *by the husband*. The tenant by the curtesy, being entitled to the *whole* estate of the wife for life, might immediately enter upon it after her death, whereas the widow, being entitled to only one third, must wait until it was assigned her by the heir, or until she obtained the allotment by judgment of law. 1 Hilliard on Real Property, 184, n. b. This may have constituted the reason for affording the tenant in dower a remedy by the writ of right, which was denied to the husband who claimed curtesy.

Neither can the plaintiff be aided by any analogy to be drawn from the remedy afforded by the absolute writ of *cessavit*. This writ, as a common law remedy lay for the owner of the estate against the tenant who had ceased for two years to pay the rent, or perform the service which his tenure required, not having sufficient goods and chattels on the land to be distrained. 2 Fitzherbert's Natura Brev. 208; Roscoe on Real Actions, 33. It did not lie for tenant in tail, or by the curtesy, until extended by statute, Westm. 2, c. 21; ib. c. 41.

We think the proper construction of our own statute which gives the writ of right, requires that we consider it as subject to the common law restrictions since its operation is not enlarged by any provision of the act.

Our conclusion is, that there was no error in sustaining the demurrer, and the judgment is affirmed.

ALLEN & WIFE *vs.* WHITE, ADM'R.

1. Where property is bequeathed in trust "for the maintenance of a married man and his family," the entire interest, as between him and his wife, vests absolutely in the husband, and, there being no children, his administrator, after his death, may recover the possession of the property from the wife in an action of detinue.
2. J. M. by his will bequeathes certain property to his son, C., in trust, &c. for the maintenance of his son, R., *his family, and lawful children, which he now has or may hereafter have, and the survivor of them: Held*— That the limitation over, in favor of the survivor, regarded as an executory devise, is too remote and is consequently void.
3. Where J. M. bequeathes property to his son, C., in trust, &c. for the maintenance of his son, R., *his family, and lawful children, which he now has, or may hereafter have, and the survivor of them*, and on the further trust, that his said son, R., jointly with the trustee, shall have the power to *sell* any part of the property, and to *dispose of all or any part of it himself by last will and testament*, the limitation over in favor of *the survivor*, being repugnant to the absolute power of disposal given to R. by the will, is void. It is essential to the validity of an executory devise, that it cannot be defeated by any act of the first taker.

Error to the Circuit Court of Russell. Tried before the Hon. Nathan Cook.

THE facts of this case are fully set out in the opinion of the court.

BELSER & HARRIS, for plaintiffs in error:

1. The intention of the testator must prevail, and to ascertain it, every clause in the instrument may be looked to, and every word in each clause weighed. Heirs of Cassal v. McMillan, adm'r, 8 Porter, 197; Rugely et al. v. Robinson et al., 10 Ala. 720; Olmstead v. Harvey, 1 Barbour, 102; McMurtre v. Dew, 3 Green, 276. The language used by the testator cannot be construed into a perpetuity, and the devise is not subject to such an interpretation. Jackson v. Christman, 4 Wend. 277; Richardson v. Noyes, 2 Mass. 56; Couch v. Gorham, 1 Conn. 36; Smith v. Cox, 3 Dev. 394; Rogers v. Randall, 2 Spears, 38; Marston v. Carter, 12 N. H. 157, Doyle v Bowler, 7 Ala. 246; Dunn & Wife v. Bank of Mobile, 2 Ala.

152. The general residuary bequest in the will prevents this objection from being successfully interposed. It carries with it to the legatees of the testator, in *personal* estate, whatever is not legally disposed of, so as to pass it to the persons intended as the object of the testator's bounty. James et al. v. James et al., 4 Paige, 115; Green v. Dennis, 6 Conn. 293; Watson v. Earl, &c., Amb. 325.

2. The court erred in charging the jury that Rufus Mills took an absolute estate in the slaves sued for. This case, so far as regards his marital rights, differs materially from those of The Bank vs. Mellan. 7 Ala. 589; Cook v. Kennerly et al., 12 Ala.; Bender v. Reynolds, ib. 446; and Moss v. McCall, ib. 630. It bears a much stronger resemblance to Fellows et al. v. Tann, 9 Ala. 1002; Spear v. Walkley, 10 Ala. 328; Rugeley et al. v. Robinson, ib. 702; Jasper v. Howard, 12 Ala. 652; and to the following decisions, in other States and in England: Holdship v. Patterson, 7 Watts, 547; Ashurst v. Givens, 5 Watts & Serg. 330; Marston v. Carter et al. 12 N. Hamp. 164; Twopenny v. Peyton, 10 Simons, 488; Godden v. Crowhurst, ib. 657.

3. The court further erred, in refusing the charge asked for by the defendants. According to the terms of the codicil, the interest which Rufus Miles had in the slaves in his life-time was merely one of maintenance, and that in connection with others. It could not have been reached by execution, and was not assignable unless with the concurrence of Columbus Mills. Mrs. Allen, who was Mrs. Mills, and the "family" of Rufus Mills, is still alive, and while she lives the trust continues "*according to the circumstances and condition of those for whose benefit it was intended.*" But even if the trust ceased on the death of Rufus Mills, still the defendant in detinue may show title, or even part title, to the slaves in others than the plaintiff's intestate, and his administrator cannot recover. James et al. v. James et al. 4 Paige, 115; Green v. Dennis, 6 Conn. 293; McCurry v. Hooper, 12 Ala. 823; Miller v. Eastman, 11 Ala. 609.

HEYDENFELDT, for defendant.

DARGAN, J.—This was an action of detinue, brought by the administrator of Rufus Mills against his widow, who in-

termarried with the defendant, Allen, after the commencement of the suit. Both plaintiff and defendant claim the slaves in controversy, under the will of John Mills, deceased, who was the father of Rufus.

The testator duly executed his will, by which he bequeathed the slaves to Rufus, the intestate. By a codicil, however, this bequest was revoked; and the rights of the parties depend on the construction that should be given to this codicil, the language of which is as follows: "I, John Mills, being anxious to revoke and alter certain devises and bequests in my will heretofore made, and to which I intend this as a codicil, do now declare the devises, legacies and bequests to my son Rufus *void*, and will that the land, slaves and property of every kind, so willed to my son Rufus as aforesaid, be given, devised and bequeathed to my son Columbus, and his heirs, in trust, that the whole of said property, its rents, issues and profits, be kept for the maintenance of my son, his family, and lawful children, which he now has, or may hereafter have, and the survivor of them, and for the education and bringing up of any and all such children as are or may be lawfully born to my said son Rufus: In trust, further to allow my said son Rufus to sell and dispose of any part of said devises, legacies and bequests, jointly with him, my said son Columbus; and in trust, that my said son Rufus may and shall have power to dispose of any or all of said estate himself, by last will and testament. It is my will, that the trusts aforesaid be carried into effect by my son Columbus, according to the circumstances and condition of those for whose benefit intended; and in the event of the death of my son Columbus, then the trust to devolve on my next eldest son."

At the time of the execution of the will, Rufus was married to the defendant Sarah A., now Mrs. Allen, but they had not then, nor ever have had, any children. Mrs. Allen claims the slaves by survivorship, and also insists, that by the terms of the will, a trust was created for her benefit, which could not be defeated by her husband, and consequently not by his administrator, and for this purpose the legal title was vested in the trustee Columbus; and therefore the plaintiff could not recover.

1. The first question that presents itself to our consideration,

is, whether Mrs. Allen took any vested interest under the will for her own separate use, or whether she took any right that did not pass to her then husband, Rufus Mills. If I were left free to lay down the law, according to my own view of it, I should be disposed to hold, that where a trust was created for the joint support and maintenance of husband and wife, that the wife would take a vested right, over which her husband had no control, and which neither he nor his representatives could defeat. This, in my opinion, would carry out the intention of the testator, which should always be the rule by which the court should be governed, unless such intention be repugnant to the laws of the country. But the question has been too often determined by this court to permit us to speculate how it should be decided. In the case of Moss v. McCall, 12 Ala. 630, it was decided, that where property is conveyed by deed to a trustee, for the mutual support of the husband and wife, and directing the profits, uses and issues to be paid to the husband and wife, for their joint maintenance, it *vests* the entire equitable interest in the husband, and that the wife took no interest in the trust. Again, in the case of Cook v. Kennerly, 12 Ala. 49, slaves were conveyed to a trustee, for the joint use of the husband and wife during their lives, with remainder to the children of the marriage, and it was decided that the husband took the entire life estate, to the exclusion of the wife. In the case of Bender v, Reynolds, 12 Ala. 446, a deed was executed by a lady, before her marriage, conveying slaves to a trustee, in trust, that immediately after the marriage, the right to the slaves conveyed, their profits and labor, should be held by the trustee, for the joint use of husband and wife, during their joint lives, and after the death of one of them to the survivor, without being in any manner liable to the husband's debts. After the marriage, the slaves went into the possession of the husband, and this court held that the deed created no separate estate in favor of the wife, bnt that the husband took the entire interest during their joint lives. These decisions were again reviewed in the case of Pollard v. Merrill & Eximer, 15 Ala. 169, and were affirmed. It must therefore be considered as the settled law, that if personal property, either by will or deed, be conveyed to a trustee for the joint use of husband and wife, that the husband will take the whole

to the exclusion of the wife. Under the influence of these decisions, Mrs. Allen could take no vested interest in the slaves, under the will of the testator, to the exclusion of her husband; for admitting that she must be considered as one of the family of Rufus Mills, yet, *as her interest was not declared to be for her separate use*, but the intent being to give her a joint interest with her husband merely, the husband must take all, to the exclusion of the wife.

2. As there were no children, can the defendant claim the slaves by survivorship? If the will had given the property jointly to the husband and wife, and after the death of one, the remainder to the survivor,—or had it given the whole to the husband during life, and after his death to the wife if she survived him, and if not, then over,—it would be very plain that she would be entitled to the whole, as she has survived her husband; but this is not the character of the bequest. The bequest is to Columbus Mills, in trust for Rufus, his family, and lawful children, which he now has or may hereafter have, and the survivor of them. Considering this in the nature of a limitation, by way of executory devise, the contingency is too remote, and the limitation void. The rule is so well settled, that it will not admit of controversy, that the contingency on which an executory devise depends must take place during the time of a life or lives in being, and twenty-one years and a fraction of a year afterwards; and therefore every contingency which is not such that it must necessarily happen, if at all, within that time, is too remote, and the first taker takes the absolute title discharged of the limitation. Fearn on Rem. 444, note a. We should have to violate this rule, before we could sustain this limitation as a good executory devise. For instance, the property is given in trust for Rufus, his family, and lawful children, both such as were then in life and such as might afterwards be born, and to the survivor of them. Now, if the limitation created by the words "*survivor of them*" be good as an executory devise, the property may be tied up, or rendered inalienable, for more than fifty years after the death of all the parties in life who took an interest under the bequest; thus, Rufus might have left two or more children living at his death, the trust would still be for them and the survivor of them, and it might have been more than fifty years

after the death of Rufus and his wife before the absolute title would have vested in the one who survived all. The limitation, therefore, is too remote, and neither the wife of Rufus nor any of his children, if he had had children, could have claimed by virtue of this limitation.

3. Independent of this view, the absolute power given to Rufus Mills, jointly with Columbus, to sell any portion of the property, during his life, with the power to devise or bequeath the whole or any part of it at his death, would be repugnant to and destroy a limitation by way of executory devise, which depended on a contingency to happen at or after his death. It is one of the qualities of an executory devise, that it is independent of the first taker, beyond his power and control, and cannot be destroyed by his act. But if the property, whether real or personal, is given to one, with power to dispose of it, the power is destructive of the executory devise, and gives to the first taker the absolute and entire estate, discharged from the limitation over. Jackson on the demise of Brewster v. Bull, 10 Johns. 19; Jackson v. Robins, 16 Johns. 537; 3 Lomax' Ex'rs, 288; 4 Leigh, 406.

Mrs. Allen then took nothing immediately by the will, and can claim nothing by way of executory devise. Her husband Rufus took the entire estate or interest, and having come into possession of it during his life, his administrator may bring detinue and recover against any one who has no legal right.

The ruling of the Circuit Court was correct, and the judgment must be affirmed.

WEST *vs.* PENNY.

1. Where an infant receives a sum of money, and covenants to pay it over in specified amounts to particular persons in another State, the covenant is viodable merely and not void. Such contract is not necessarily prejudicial to him; nor does he thereby subject himself to damages, or a breach of trust in respect of a third person.
2. The verbal affirmance of a contract, made during minority, renders it valid from its date, and, whether under seal or not, the contract

may be declared on without noticing the subsequent promise. The subsequent promise is in legal effect but a waiver of the defence of infancy, and a ratification of the original contract.

Error to the Circuit Court of Perry. Tried before the Hon. John D. Phelan.

This was an action by plaintiff against defendant in error on a writing under seal, by which the defendant acknowledged to have received from the plaintiff the sum of fifteen hundred dollars, which he covenanted with him to pay over to certain persons in Tennessee, in specified amounts. The defendant interposed the plea of infancy, to which the plaintiff replied a promise to pay after he had become of age. The defendant demurred to the plaintiff's replication and the court sustained the demurrer. The judgment of the court is now assigned as error.

John, for plaintiff in error:

1. The replication is sufficient—it was not necessary to set out in the replication the precise mode of ratification. 3 Chit. Pl. 1147, 1148.

2. The contract upon which this suit was brought is not void but voidable. 2 Kent's Com. 233, 234, and cases cited; Macpherson on Infants; Law Lib. 41, 477; Roof v. Stafford, 7 Cow. 179; Whitney et al. v. Dutch et al. 14 Mass. 456; Martin v. Mayo, et al. ex'rs, 10 Mass. 137; Boot & wife v. Mix, 17 Wend. 119, 131; Wright v. Steel, 2 N. Hamp. 51; Southron v. Whitlock, Strange, 690; Tucker, et al. v. Moreland, 10 Pet. 58; Fant v. Cathcart, 8 Ala. Rep. 725; Thomason v. Boyd, 13 Ala. Rep. 419.

3. And consequently may be made binding by a promise after the infant arrives at maturity.

4. An infant is liable in trover for goods delivered to him under contract, although they were not actually converted to his own use. Vasse v. Smith, 6 Cranch, 226.

5. An action for money had and received will lie against an infant to recover money which he had embezzled. *Vide* Bristow v. Eastman, 1 Espin. Rep. 172, and Kent's Com. 241. If trover or assumpsit had been the form of action, the plea of infancy would not have been a good defence.

6. This being an action founded upon a contract not conflicting with public policy, nor founded on an illegal consideration and the defendent liable in assumpsit for the embezzlement, it would seem that he should be bound by his ratification, as no injury could result from such construction of the contract.

7. There are in our American Reports many contracts similar in their form to this, and not one of them so far as I have been able to discover, has been declared void, but have all been held voidable only. In England, contracts similar in some respects to this, have in some instances been declared void, but for reasons which do not exist with us.

8. The question as to what manner a ratification can be made is not properly raised on this record. But it is clear from the whole current of authority almost unbroken, that the ratification need not be under seal, nor in writing, but may be by express promise, or by act from which such promise may be inferred, and this point is fully settled by the case of Fant v. Cathcart, 8 Ala. Rep. 725. In fact, this case, I think, is full on both the principal points involved in the case at bar.

J. W. Garrott, for defendant:

1. Was this contract thus entered into, binding upon the infant? Clearly not—it was void. Contracts of infants are void when prejudicial to their interests. Story on Con. § 37–40–42–3; McPherson on Infants; 41 Law Lib. 477; U. States v. Bainbridge, 1 Mason, 82; Custen v. Patton, 11 Serg. & Rawle, 305; Bayley v. Denly, 3 Maul, & Sel. 477.

2. So strongly does the law condemn the placing of money in the hands of an infant, that it will not even allow a recovery for money lent to an infant, though laid out in the purchase of necessaries. 1 Black. 388, note 17; Probart v. Knouth, 2 Esp. Rep. 472, note.

3. The rule laid down in Zouch v. Parsons, 3 Burr. 1794, which seems to be followed up by most if not all subsequent authorities, is this, all such gifts, grants or deeds by infants as do *not* take effect by delivery are void, otherwise voidable, in other words, the difference is between executed and executory contracts. Story on Con. § 1041, 42. As this contract was executed on the part of the plaintiff and executory on the part

of the defendant, the money sued for cannot be recovered. Story on Con. § 42; Shaw and wife v. Boyd, 5 Sergeant & Rawle, 309.

4. But if it were capable of revival or ratification, do the pleadings show it? They do not. This contract being under seal, it could only be ratified or enforced by an instrument of equal solemnity and dignity. Bayley v. Denly, 3 Maul & Sel. 477; Tucker v. Moreland, 10 Pet. 58; Goodsell v. Myers, 3 Wend. 479; 41 Law Lib. 478; Crawford v. Childress, 1 Ala. Rep. 482; Standifer v. White, 9 Ala. Rep. 527. The replication no where alleges, that this ratification, confirmation, or revival, was by an instrument under seal, and an instrument under seal could no more be introduced as evidence under such a replication, than it could under a declaration without the proper averments. 1 Chit. Pl. 648; Bayley v. Denly, 3 Maul & Sel. 477. Again: If such a contract could be revived or ratified otherwise than by instrument under seal there would be a clear departure in the pleadings. For the issue under the declaration would be on a sealed instrument, and under the replication it would be on a parol promise.

COLLIER, C. J.—The contracts of an infant are in general *voidable* and may be confirmed when he comes of age; those alone are treated as absolutely void, which are certainly and in their nature prejudicial to his interest. 2 Greenl. Ev. § 367; Story on Con. § 57, 2d edit. In the latter case, the presumption is almost irresistible, that some unfair advantage has been taken of him, or some injurious influence has been exerted. The difference in this respect between the contracts of adults and infants is, that in the one case injury is only evidence of imposition, while in the other it is an uncontrolable presumption thereof, because of the inexperience of the infant. Thus where a bond is executed by an infant as a surety, or where a release is executed by him to his guardian, inasmuch as these cannot be for his benefit they are void. To these might be added a few other examples. It is however, the policy of the law, not to incumber the free action of infants by disabilities, but only to allow them the right to suspend their ultimate decision upon a doubtful question of benefit until they shall be of full age, and placed on a footing similar to

that of the other contracting party. Hence the courts lean to construing the contracts of infants to be voidable only. Id. See also Story on Con. §§ 58, 59; Waples v. Hastings, 3 Har. Rep. 403; Lawrence v. McCarter, 10 Ohio Rep. 37; Patchin v. Cromach, 13 Verm. Rep. 330; Bouchell v. Clary, 3 Brev. Rep. 194; Reed v. Bachelder, 1 Met. Rep. 559; Oliver v. Hondlet, 13 Mass. Rep. 237; Whitney v. Dutch, 14 Mass. Rep. 457; Maples v. Wightman, 4 Con. Rep. 376; Thompson v. Hamilton, 12 Pick. Rep. 425; Fridge v. The State, 3 Gill & Johns. Rep. 103; Tucker, et al. v. Moreland, 10 Pet. Rep. 58, Zouch v. Parsons, 3 Burr. Rep. 1794; Fant v. Catchcart, 8 Ala. Rep. 725.

In the celebrated opinion of Lord Mansfield, in Zouch v. Parsons, *supra*, it is said, "if a new case should arise where it would be *more beneficial to the infant*, that the deed should be considered as void; if he might incur a forfeiture or be subject to damages, or a breach of trust, in respect of a third person, unless it was deemed void—the reason of the privilege would warrant an exception in such case to the general rule." The Court of Appeals of Kentucky said: "We incline to the opinion expressed by Lord Mansfield, that there is no instance where the other party to a deed can object on account of infancy, and consequently that no deed of an infant is void for infancy only, unless one might be so, which would be embraced in the following classification suggested by the same jurist." The classification referred to is embraced in the paragraph above quoted.

The contract evidenced by the writing declared on, does not come within either of the classes stated in Zouch v. Parsons. It certainly *does not subject the defendant to damages or a breach of trust in respect of a third person*, so far as we can judge from its terms, but left him free to perform all the duties and obligations he was under to others. Nor can it be assumed that the contract was necessarily prejudicial to the defendant. He may perhaps have been well compensated for the service which he stipulated to perform; or it may be, that he desired or intended to go to Tennessee on business other than the plaintiff's, and that the payment of his expenses was really a benefit to him. The defendant's undertaking did not require any unusual skill and judgment, but only that he should

be the bearer of money a few hundred miles, through a country in which little danger was to be encountered and pay it to persons designated to receive it. It can hardly be necessary to consider what would be the measure of damages upon such a contract if the defendant had been an adult, or whether it could be more than the amount of money converted. Be this as it may, it is clear that the recovery against the defendant cannot exceed the sum he has promised to pay since he attained his majority; this we understand to be the money appropriated with interest. But of this the jury must determine from the evidence. In every point of view in which we have been able to consider the defendant's engagement, it seems to us to be voidable merely, and capable of confirmation after he came of age.

The adoption or affimance of a contract or waiver of a defence by an infant on obtaining his majority, will make the contract valid from its date, and an action need not be brought on the new promise. Whitney v. Dutch, 14 Mass. Rep. 457; Kline v. Bebee, 6 Con. Rep. 494. But where the contract is evidenced by *a bond with a penalty*, the action must be brought upon the new promise; the simple contract debt not being merged in the bond. Bayley v. Denly, 3 M. & S. Rep. 477; Thornton v. Illingsworth, 2 Barn. & C. Rep. 824. An infant after attaining his majority may affirm his deed, which is voidable only, by a verbal promise without writing. Houser v. Reynolds, 1 Hayw. Rep. 143; Kline v. Bebee, *supra;* Fant v. Cathcart, 8 Ala. Rep. 725.

The promise made to pay a debt contracted during minority, in legal effect is a waiver of the defence of infancy, and an election to consider it valid. It is consequently immaterial whether the original contract was entered into by deed or other less solemn writing; a verbal adoption of it, after the party who assumed the duty came of age, would be quite as effectual as a promise under seal to pay, or perform it. This being the case, it is clear that the defence of infancy being excluded the *voidable contract becomes valid from the time it was made*, and may be declared on without noticing the subsequent confirmation further than to reply it, if infancy should be pleaded. The case of Crawford and another v. Childress' ex'rs, 1 Ala. Rep. 482, bears no analogy to the present. The

question there was, whether a verbal acknowledgment by the obligor will prevent the statute of limitations from running against a *bond*, or will revive a remedy upon it after the bar of the statute has become complete. Under the influence of our statute and the construction which had been placed upon similar enactments in other States, we held that a mere verbal acknowledgment was insufficient to arrest the operation of the act, or to revive the remedy upon the bond.

Without adding more, we have only to declare that the judgment of the Circuit Court is reversed, and the cause remanded.

FOSTER *vs.* SMITH.

1. A claimant, on a trial of the right of property, cannot show title in a stranger, for the purpose of defeating its condemnation.
2. If a deed be made directly to a married woman, a Register in Chancery has no authority to appoint a trustee to execute it.
3. In a proceeding under the statute to try the right of property, the general issue, after the *onus* is shifted, puts the claimant upon proof of his right to interpose the claim.

Error to the Circuit Court of Monroe. Tried before the Hon. John Bragg.

This was a trial of the right to a slave, levied on under an execution in favor of defendant in error against James H. Draughan, and claimed by the plaintiff in error as trustee of Jane S. Draughan, wife of the said James H. The plaintiff in execution having proven possession of the slave by the said James H. Draughan at the time of the levy, and its value, the claimant read to the jury a deed from James M. Lindsey to the said Jane S. Draughan, by which he conveyed the said slave to her, for her sole and separate use; and then introduced a certified transcript of an order, made by the Register in Chancery at Monroeville, on the petition of the said Jane S. Draughan, appointing the claimant trustee for her under said deed, and offered to read it to the jury, but the court decided,

that it afforded no evidence of the fact, which it was offered to establish and rejected it as evidence. The court charged the jury, 1st, that the claimant, under the issue formed, was bound to show that he was the trustee of Jane S. Draughan: 2d, that he could not avoid a condemnation of the property by showing title in Jane S. Draughan.

To the ruling of the court, and to each charge given, the claimant excepted, and now assigns these matters as error.

T. & J. WILLIAMS, for plaintiff:

1. The only proper issue on trial of the right of property upon a claim interposed under the statute, is an affirmation on the part of the plaintiff in execution "*that the property levied on is subject to his execution*, and a *denial of that fact* by the claimant." The Planters' and Merchants' Bank of Mobile v. Willis & Co. 5 Ala. 770.

2. Upon such an issue, the claimant will not be allowed to show want of consideration in the original cause of action. 8 Ala. 104; nor that the judgment was *unjust*, or that the plaintiff in execution was dead before the levy—8 Porter, 565; 4 Ala. 667; nor that there was error in the judgment—4 Stew. & Porter, 168; nor to impeach the fairness of the judgment. 3 Porter, 401; nor can the claimant avail himself of any defect in the judgment—5 Port. 182; 4 Stew. & Port. 237; nor is plaintiff in execution bound to produce the judgment—6 Porter, 452; nor can claimant show that a lien produced by attachment on which execution issued was lost by giving replevy bond. 8 Porter 131.

3. On such an issue plaintiff in execution cannot object that claimant is an infant. Mundine v. Perry, 2 Stewart & Porter, 130.

4. In action by feme covert, coverture must be pleaded in abatement. 8 Ala. 955. And where general issue is pleaded it is a waiver of plea in abatement. Wilson v. Oliver, 1 Stew. Rep. 46; Draughan v. Tombeckbe Bank, ib. 66; and pleading to merits, after plea in abatement overruled, *waives* the right to *review* decision on overruling plea. Wade & Kelly v. Hutheson, 2 Stewart, 443.

5. The general issue, or other plea in bar, admits the character in which the plaintiff sues to be such as is set out in the

declaration. Strickland, et ux. v. Burnes, 14 Ala. 511, and the authorities there cited. 1st—The affidavit claims as trustee of Jane S. Draughan. 2—The bond sets forth the claim to have been as trustee of Mrs. Draughan. 3—And the plea does the same, and to this plea the similiter is in by plaintiffs.

6. Under an equitable construction of this statute, the appointment of plaintiff as trustee by the Register in Chancery is valid. Vide Clay's Dig. 350, §§ 32, 33. A Judge of the Circuit Court, under the equity of the statute, (Clay's Dig. 581, § 3,) may appoint a trustee. The State Bank v. Smith, 6 Ala. Rep. 75.

COOPER, for defendant:

1. That the claimant was bound to show a legal estate or title in himself, and his appointment as trustee (the deed not creating him trustee) was a necessary matter to be proved, and not proving himself trustee, he could not recover.

2. That the circuit court has no power to *create* a trustee, especially in a case like the one at bar.

3. If the power exists that the time and manner is a matter of discretion, and the court may well refuse in the middle of a case to aid the parties by appointing a trustee; its effect in this case would have been to make a new party.

CHILTON, J.—It is perfectly clear that if the claimant has no right to the property, the title to which he proposes trying by interposing his claim, he cannot recover, because a third person, a stranger to the proceeding, may be supposed to have a title paramount to that of the defendant in execution. By the interposition of his claim, he arrests the execution of the process upon the property to which he asserts title, and virtually asserts that the sale of it for the satisfaction of the plaintiff's *fi. fa.* is inconsistent with *his* rights. If he has no such rights, it is a matter of no concern to him whether the rights of third persons, between whom and himself there is no privity, may be invaded. McGrew v. Hart, 1 Por. Rep. 175; How, et al. v. Downman, 11 Ala. Rep. 880. See also Dent v. Smith, 15 Ala. Rep. 286.

The deed of gift from Lindsey to Jane S. Draughan for the slave in controversy was made directly to her, without the

intervention of a trustee. The claimant offered in evidence what purported to be a record of his appointment as trustee for Mrs. Draughan under said deed, by the Register of the Chancery Court at Monroeville, which evidence the Circuit Court rejected. The court decided correctly that such appointment was a nullity. The Register had no power to make it. The statute authorises the Register, when any trustee shall die, to appoint one or more trustees in the place of such deceased trustee, upon the application of any person interested in the trust estate, provided notice, &c. be given. Clay's Digest, 350 § 33. But the power is not vested in the Register to appoint a trustee for the execution of a deed which is not a conveyance to a trustee. The same may be said with respect to the Act of 1829, authorising the Circuit Court to appoint a trustee in case of the resignation or removal of the trustee named in the deed. Clay's Digest, 581 § 3. The Court of Chancery is alone adequate to afford relief in such case. It follows then, as the appointment by the Register of the claimant trustee for Mrs. Draughan, was *coram non judice* and void, and as the Circut Court had no power to make the appointment which the claimant sought to have made upon the trial, that the said claimant had no right to the property, and therefore no right to interpose his claim.

The doctrine that a party is considered as admitting the character in which a plaintiff sues by pleading the general issue or plea in bar, can have no application to this case, so as to dispense with the necessity of proof of title in the claimant, when the burden of proof has been once cast upon him by the proof of property in the defendant in execution. It would be difficult to conceive, how the trusteeship of the claimant could be otherwise brought within any legitimate issue than as connected with the proof of his title. The plaintiff in execution avers, that the slave levied upon is subject to the execution; the claimant as trustee, negatives or traverses the plaintiff's averment and thus an issue is formed under the direction of the court, as provided for by the statute. Planters' and Merchants' Bank of Mobile v. Willis & Co. 5 Ala. Rep. 770. Pleas in abatement as to the character in which the claimant interposes his claim, are unknown in this statutory proceeding to try the right of property.

But I am clearly of opinion, that if he had brought his action of detinue, as the trustee of Mrs. Draughan, and the general issue had been pleaded, it would not have sufficed for him merely to have shown a bill of sale or deed of gift to her, without connecting himself with her title. Where an assignee of an insolvent brings assumpsit, the general issue does not supercede the necessity of proving that he is such assignee; and so of insolvent's trustees. 2 Wend. Rep. 319, and cases there cited by Marcy, J. 2 Gill. & Johns. 73; 2 Phil. Ev. (C. & Hs. notes) 448. So in this case, we think it would have been incumbent on the complainant to have proved that the trusteeship had devolved on him, if the proof of the devolution of the trust was necessary to vest in him a title. Nabors v. Shippey, 15 Ala. Rep. 293.

We are unable in any aspect of the case, to percieve any error in the record, and the judgment is consequently affirmed.

DELAGE ET AL. *vs.* HAZZARD ET AL.

1. H. and F. filed a bill to foreclose a mortgage, executed to them by D. to secure the payment of two notes, given for certain plates and maps which H. and D. had agreed to deliver to him at Mobile: The contract not having been complied with by H. and D., the chancellor was of the opinion that the complainants were not entitled to the releif prayed, but, the several parties having avered in their pleadings a willingness to perform, he decreed that H. and D. should deposit the plates and maps with the Register within six months, and in case of default therein, that the bill be dismissed, and that D. should pay into the hands of the Register the amount due on the notes, and in case of default therein, that the mortgage be foreclosed. Before the expiration of the six months, H. and D. shipped the plates and maps to B. at Mobile, to be delivered in compliance with the decree: B. met the Register, who passed the greater part of the six months out of Mobile, in the street, and informed him that he had the plates and maps for him, and was requested by the Register to let them remain in his store until he wanted them, when he would send for them, in conse-

quence of which they were not deposited in the Register's office until six weeks after the expiration of the time limited by the decree. *Held:*

I. That performance within the period specified by the decree is to be considered in the nature of a contract, of which time is a material part.

II. That, although time is a material part of the contract, and a failure to perform within the period prescribed, if the default is the result of mere neglect, leaves the party without remedy, yet if a sufficient excuse can be shown for it, and no injury appears to have resulted therefrom to the other party, the court should not withhold its aid.

III. That the circumstances of this case afford a sufficient excuse for the default of H. and D.

Appeal from the Chancery Court of Mobile. Tried before the Hon. Jos. W. Lesesne, Chancellor.

THE defendants in error filed their bill to foreclose a mortgage, executed by the plaintiffs in error, to secure the payment of two notes given to them as the agents of Hinman & Dutton. Delage answered the bill, in which he denied the consideration of the notes, and alleged that they were executed to the firm of Hazzard & Fowler, as agents of Hinman & Dutton of Philadelphia, in payment of certain copper plates, engraved by them for the purpose of publishing maps of the city of Mobile, which plates were to be furnished by the complainants for the sum of $875, payable on their delivery: that on the execution of the notes he received a receipt from Hazzard & Fowler, which was in full for the said plates and certain maps: that the respondent has since paid five hundred and fifty dollars on said notes, and was then and always had been ready to pay the balance, on the receipt of the maps and plates, according to the terms of the contract; and that the respondent has often applied to the complainant for the plates and maps, and offered to pay the amount due on their delivery, but has not been able to obtain them. Sertorius the other defendant did not answer the bill, but jointly, with Delage, filed a cross bill, by which a discovery was sought to establish the facts alleged in the answer of Delage. The answer of Hinman & Dutton, admits that the plates have not been delivered, and insist they were not bound to deliver them until the money due them was paid, but submits that they are ready and willing to deliver them in obedience to any order the court may make.

On the hearing of the case, the chancellor was of opinion that the complainants were not entitled to the relief sought by their bill, but as the parties by their pleadings had expressed a willingness *still* to comply with their contract, he decreed that the complainants should deposite with the Register of the court, the plates and maps, within six months, and that the defendant Delage, within the same period, should pay into the hands of the Register the amount still due, and in case of default, on the part of the complainants, in depositing the plates and maps, within the time prescribed, the bill be dismissed; and in case of default on the part of Delage, a decree of foreclosure and sale to be rendered.

The plates and maps were not deposited with the Register within the time prescribed, and on the first Monday in November, the defendant moved the Register to dismiss the bill. In December, the plates and maps were deposited with the Register, and the cause remained on the docket until the April term, 1848. Evidence in the meantime was taken, both by the complainants and defendants: on the part of the complainants, to show that the bill ought not to be dismissed, and on the part of defendants to show that it should be, according to the decree. At the April term 1848, the complainants moved the court for a decree of foreclosure, and the defendants moved to have the bill dismissed. The chancellor rendered a final decree in favor of the complainants, foreclosing the mortgage, and from this decree of foreclosure the defendants have appealed.

Hamilton, for plaintiffs:

1. The court erred in not dismissing complainants bill, in accordance with the decretal order of 13th of April 1847. The record shows a clear failure of consideration for the notes and mortgage of Delage, and this being so, and the chancellor in accordance with the proffer of Delage, having given the complainants six months within which to comply with his bargain, Delage was entitled to a strict compliance with that order. This was not done by complainants. The proof clearly shows the deposite of the plates and maps was not made, (to say nothing of the letter of the order) in compliance with the spirit of the order; no deposite was made, but

the agent, negligently assuming certain facts, contented himself with simply telling the Register in the street, that a box of maps and plates had been received for him. It is true, in some cases, time is not of the essence of the contract, but here the matter is not of a contract, it was a condition imposed by the chancellor, and not by the consent of Delage. It was a liberal extension of time by the chancellor, to the party to complete a contract, that by the terms of it should have been *entirely executed years before;* it was a liberality he had no right to claim or ask for. Delage was entitled to the immediate possession of the plates and maps contracted for on the execution of the receipt by Hazzard & Fowler, the agents of Hinman & Dutton, on the 10th day of October, 1838. The execution of that receipt worked a payment of the account of Hinman & Dutton, and their recourse was then upon the notes and mortgage. But until the delivery of the plates, &c. to Delage, the notes remained without a consideration, except as to the thirty maps delivered. See 9 Johns. 310; 3 Call's Rep. 234; 6 Cranch. 253; 4 Vern. Rep. 555; 2 Yeates Rep. 370; 4 Pick. 444; and Lee's adm'rs v. Fountain & Freeman, 10 Ala. Rep. 765–67. But time is sometimes of the essence of a contract, for if the failure to comply at the time named, works an injury to a party, it is every days practice to sue for and recover damages for such injury. See 1 Con. Eng. Chan. Rep. 306; Jackson v. Ligon, 3 Leigh's Rep. 188; 1 Johns. Chan. 375; Garnett v. Mason, 6 Call's Rep. 308. See also 4 Port. 297, 374. In this case great injury had already been suffered and if for the sake of quiet, Delage was willing to put up with that injury, it is no reason that the injury should be continued, and even notice to McRae within the time would not be sufficient; he would have no right to waive *the right of Delage to a delivery.* There was no substantial compliance with the order of the chancellor. The order is to *deposite with the Register* within six months. The telling the Register in the street, that a box of maps and plates had been received for him, in the lose words proven, is *not depositing* with him. To tell an administrator in the street, in the manner proven here, of a debt due by his intestate would be no presentation of the claim under the repeated decisions of this court. Such a verbal notice given an indorser of non-payment of a note, would

not be notice to bind, for by all the decisions, it must be some notice or description of the claim or note sufficient to identify it, and the matter must be so presented as to attract his attention and show an intention to enforce the claim. See 10 Ala. Rep. 17; ib. 970; *vide* also 7 Ala. Rep. 211. Actual filing of the pleadings in equity must be made, mere notice is not sufficient. 9 Paige Rep. 252.

2. The action of the chancellor cannot be sustained on any motion of discretion, for power to alter or suspend a former decree of his court. The decree of 13th April, was final, and fixed the rights of the parties on a basis far more favorable to the interest of H. and D., than they had any right to expect; it was made after report of the Master. The term of the court was closed, the chancellor who had pronounced the decree, had departed this life, a new term had commenced, and another chancellor on the bench. The power of the courts of law and equity in this State, over their records and decrees, extends no longer than during the term they were made. 3 Stewart's Rep. 288, 296; 1 Bald. Rep. 287. This is no bill of revivor, or proceeding of that nature.

3. The failure of the complainant to make the deposit required itself worked a dismissal of the bill—1 Craw. & Dix, 461; 4 Am. Eq. Dig. 547; and it is submitted, it would be highly inequitable to deprive Delage of the advantages of that dismissal on any notice of his being in default. The maxim that "*he who seeks equity must do equity*," does not apply; for Delage is not seeking the action of the court—he asks to be let out of court, to be let alone. He has paid half the mortgage debt, or nearly so, without receiving the equivalent contracted for, but is willing to bear that loss, if he can find quiet with it.

CAMPBELL, contra:

1. The evidence of *McRae and Burnell*, shows a substantial compliance on the part of the defendants in this court with the terms of the order.

2. A court of chancery has power to set aside defaults and to give supplemental directions for the execution of its decrees. The exercise of these powers rest within the sound discretion of the court. Conceding that the defendants did not literally comply with the order of the court, a sufficient excuse

is shown. The order of the court discharging a forfeiture is not revisable. 9 Paige, 395; 7 Paige, 382; 1 Johns. Chan. Rep. 539; 3 do. 415; 12 Peter's 472; 2 Hill's Ch. Rep. 153; 2 Harris & Gill, 346; Phil. Dig. 481; 14 Ala. Rep. 753; 4 Ala. 469; Smith's Actions at Law 23, 500–61–78, 770; 60 Law Library. The defendants in this court made a bona fide effort to comply with the order of the chancellor. There was no wilfulness in the default. The plaintiff has been a defaulter since the rendition of the decree and has not offered to perform it. He is in no condition to insist upon a strict construction. 1 McLean, 395.

DARGAN, J.—If we are to consider the failure of the complainants to deliver to the Register, the plates and maps within the time prescribed by the decree, in the nature of a default in not observing the rules of a court of equity, or even as not observing an order made in the progress of a cause, it is very certain that the chancellor may, in the exercise of his discretion, relieve them from the legal consequences of such default. Beekman v. Peck, 3 Johns. Chan. Rep. 414; Wooster, et al. v. Woodhull, 1 Johns. Chan. Rep. 538; and it is said in the case of Ashe v. Moore, 2 Murphy, that every order made in the progress of a cause may be rescinded or modified upon a proper case being made out.

But we think the decree of the chancellor, prescribing the time, within which the maps and plates were to be delivered to the the Register by the complainants, and the money to be paid by the defendant, must be considered in the nature of a contract of which the time of its performance is a material part. In the opinion of the chancellor, the complainants were not entitled to relief, but as both parties expressed a willingness still to comply with the contract, &c. ordered the complainants to deliver the plates and maps to the Register of the court, within six months from the date thereof, and if they made default the bill to be dismissed; and the defendant, within the same time, to pay the money into court, and if he made default, a decree of foreclosure to be rendered. Under this decree, the entire equity of the complainants depended upon their compliance with the order of the court. If they did not perform within the time prescribed, they *were without equity*. If, therefore, the

rights of the complainants depend on their performing within a specified time, a contract, which on their failure to perform, was to be void, and they made default, *they were without remedy*, unless they could show some legal excuse for not performing it within the *prescribed time.* This a court of equity will permit them to do. For although time may be made a material part of the contract, and a failure to perform will deprive the party in default of all equitable relief, if that default is the result of mere neglect, yet it is clear, that he may show that his failure to perform, was not the result of negligence, but resulted from causes that would render it inequitable to deprive him of relief. Benedict v. Lynch, 1 Johns. Ch. Rep. 370. In the case of Langworth v. Taylor, 1 McLean, 395, the court said, it is the province of chancery to relieve against penalties and forfeitures, but it would be strange, if relief could be extended against the positive stipulations and understanding of the parties; this would not be to give effect to the contract, but to make a new one between the parties, contrary to the terms they had adopted. At law time is always an essential part of the contract, but a court of chancery will consider it in connection with all the circumstances of the case, and if the party can show that he has been prevented by inevitable accident, or from any justifiable excuse from performing his part, at the stipulated time, and the other party has suffered no injury from the delay, the court will not withhold its aid. And in the case of Hays v. Hall, 4 Porter, 374, this court said, that time may be made a material part of a contract, and if the complainant has failed to perform his part, at the appointed time, without excuse on his part, or the assent of the other party, chancery will not relieve him. These authorities clearly show that equity will relieve a party from the consequences of a failure, on his part to comply with the contract at the appointed time, if he can show that this failure resulted from any cause, that will afford a sufficient legal excuse, and the other party has not been injured by the delay. If his default has resulted from negligence merely, and has not been waived by the opposite party, a court of equity ought not and will not afford relief to the delinquent party. But if the default occurs without neglect, and from causes, that a court of equity will consider as a sufficient excuse, relief ought to be granted. Test-

ing then, the decree of the chancellor by those rules that govern contracts, in which time is a material part, and the question is, did the complainant show a sufficient excuse for not delivering the plates and maps to the Register, within the time fixed by the decree? The complainants reside in Philadelphia, and the maps and plates were shipped by them to Mobile, and were received by Bunnell, their agent, for the purpose of being delivered to McRae, the Register, within the six months. McRae, during the six months, remained the greater part of his time at Pascagoula, but his office was regularly attended by a deputy. Before, however, the six months had expired, Bunnell seeing the Register in the street, informed him that he had received the maps and plates for him. The Register replied, that he was then on his way to Pascagoula, and requested Bunnell to let them remain in his store until he wanted them. The plates and maps were deposited in the office of the Register, in about six weeks after the six months had expired, within which the complainants were ordered to deliver them to him. If we consider this as a non-compliance with the terms of the decree, the question arises why did Bunnell, the agent of the complainant, fail to comply? May it not be fairly attributed to the Register, and not his, Bunnell's neglect? Had the Register directed him where to deposite them, is it but reasonable to suppose he would have complied with his directions, as under his instructions, or at his request, he permitted them to remain in his store. The complainants were ready and willing to deliver them to the Register, before the six months expired, but under the instructions, or at the request of the Register, did not deliver them, until about six weeks after the time expired. We cannot attribute this failure to deliver to the negligence, either of the complainants or of their agent, but to the request of the Register, who was to receive them, and it is not pretended that any injury has resulted from the delay to the defendant. This, in our opinion, is a sufficient excuse for not delivering the plates and maps to the Register, within the prescribed time, and the decree of the foreclosure, must be affirmed.

THOMPSON *vs.* HALL.

1. The first section of the Statute of Frauds (Clay's Dig. 254) does not require that a written undertaking to pay the debt of another should state the consideration of the promise.
2. Every writing, which is the foundation of an action, being made by the statute of 1811 (Clay's Dig. 340, § 152) "evidence of the debt or duty for which it was given," it is not necessary, in declaring on a promissory note, to allege the consideration. The fact that the note appears on its face to have been given for the debt of another cannot affect the principle.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

This was an action of assumpsit by plaintiff against the defendant in error. The declaration is as follows: "For that whereas said defendant heretofore, to-wit, on the twenty-second day of March, A. D. 1842, at Mobile, to-wit, in the county aforesaid, made his certain promissory note in writing, by which said note, defendant promised to pay the plaintiff the sum of five hundred dollars, the amount of plaintiff's account for professional services rendered the heirs of William E. Kennedy, when the estate of the said William should be in funds, and the plaintiff avers," &c. To this declaration the defendant demurred, and the court sustained the demurrer. The judgment of the court is now assigned as error.

Lockwood, for plaintiff in error:

The demurrer to the plaintiff's declaration should have been overruled. It is not essential in this State, that the writing promising to pay the debt of a third party should contain the consideration of the promise. The language of the statute of Frauds in this State is different from that of Charles II., and hence it is construed differently. The statute of this State contains the word "promise," which is not embraced in the English statute. Violet v. Patton, 5th Cranch, 151; Pierce v. Wren et al., 4 Smead & M. 97; Taylor v. Williams & Ross, 3 Yerger, 330; Clay's Dig. 254; Sage v. Wilcox, 6 Conn. 81; 17 Mass. 121; Pract. Abridg. vol. 5, 505; 1 Kinney's Law Comp. 243-4.

Our statute seems to have the object distinctly in view, to place all written instruments upon the same footing, and to cast on the defendant the *onus* of showing there was either an illegal or no consideration in all cases where the action in its form was founded on the writing. Chamberlain v. Darrington, 4 Porter, 525-6-7; Clay's Dig. 340; Allen v. Dickinson, Minor's Rep. 120; Philips v. Scoggins, 1 S. & P. 28; Click v. McAfee, 7 Porter, 62; Young v. Foster, 7 Porter, 420; Holman's Heirs v. Bank of Norfolk, 12 Ala. 413.

The instrument, the foundation of the action, imports a consideration for the promise. Click v. McAfee, 7 Porter, 62.—Whether the instrument declared on contains a consideration or not, it is not necessary to be averred in the declaration. The construction of the statute of 1811 makes it incumbent on the defendant, if there is no consideration, or if the consideration is illegal, to plead it, and such defences cannot be reached by demurrer.

Hopkins, for defendant:

As the note is a promise to pay the debt of others, it was not binding at common law without a sufficient consideration; a consideration is as necessary since the statute of Frauds as it was before, and it is necessary also since that statute, that a sufficient consideration should be alleged in the declaration. 1 Wms. Saund. 267, 268, and note 2; 6 Ala. 415, 416; Hester v. Wesson, 7 Term Rep. 350, note; 39 Com. Law Rep. 137, 183.

The consideration of the promise must appear upon the written instrument itself, and cannot be proved by verbal evidence. 56 Law Lib. 36-37-38; 1 Wms. Saund. 268, note 2; 6 Com. Law Rep. 531-532-533-534; 39 Com Law R. 137-144.

The statute of 1811, which makes the instrument declared upon the evidence of the debt or duty, was not intended to defeat the object of the statute of Frauds, and therefore does not authorise a written promise to be evidence of a sufficient consideration when the written promise itself contains no express statement of a consideration in favor of the defendant who had promised to pay the debt of another. 6 Com. Law R. 533; 11 Com. Law Rep. 56.

Regardless of the question whether the consideration must

appear from the written promise, the demurrer was properly sustained to the declaration in this case. The written instrument, upon which the suit is founded, contains the promise of the defendant *to pay* $500, *the amount of the account of the plaintiff for professional services rendered the heirs of Wm. E. Kennedy*, when the estate of the said William might be in funds. This is the substance of the note, as set out in the declaration. Every material part of the note ought to appear in the declaration, and the declaration must be considered in this case as if every such part were set out in the declaration. The declaration describes a note in which the defendant expressly promised without consideration to pay the debt of others.—The note proves the defendant promised to pay the debt of third persons, and as the note is evidence of the whole contract, it is proof also that he promised without consideration to pay it, as no consideration appears in the note. There is therefore no cause of action contained in the declaration. If a note or bond contained a promise to pay $1000 with interest from date at the rate of 20 per cent. per annum, while usury made the whole contract void, or if it were stated in a note that the amount thereof was for money lost at gaming, and the instrument was thus set out in the declaration, a demurrer, if taken, would be sustained to it, because it would contain no cause of action. 14 Ala. Rep. 23, 26, Renfro v. Heard; 13 Ala. Rep. 21, Tenison v. Martin.

A rule of the common law prevents a party from showing by verbal evidence that the contract is different from the written one on which he has declared, and limits the cause of action to the written contract set out in the declaration. As the promise of the defendant is in writing, which contains the whole contract, verbal evidence would not be competent to prove a consideration to the defendant, and thus add a term to the contract which the written one does not contain. 6 Com. Law Rep. 534; 11 Com. Law Rep. 56.

As the declaration is upon a written promise to pay the debt of others, and shows no consideration to the defendant, and such a consideration could not be proved by verbal evidence without altering the written contract by parol proof, the declaration contains no cause of action and shows there is none. 6 Com. Law Rep. 531. See the written contract to

pay without consideration the debt of another, set up in the replication to the plea—6 Com. Law Rep. 532, 533, 534; 11 Com. Law Rep. 56; 39 Com. Law Rep. 137, 138; 3 Stew. and Por. 271: 2 Ala. Rep. 283; 8 Ala. Rep. 247, Tankersley v. Graham.

It does not appear from the record that the defendant is one of the heirs of Wm. E. Kennedy. The fact is, he is not one of the heirs. The written contract allows no indulgence to the heirs. The plaintiff might have sued the heirs for his account immediately after the promise of Hall was made. If Hall were one of the heirs, the promise would be to pay the debt of several persons, and therefore of others. If an executor who is the sole heir and distributee of his testator, promise in writing to pay a debt of his testator without consideration, the promise is void, because it is to pay a debt of another without consideration. 7 Term R. 350, note; 6 Ala. Rep. 415, 416. The promise to pay when the estate of Kennedy might be in funds, shows Hall had the control of that estate, and must have been the personal representative of Kennedy. The promise therefore is the promise of the representative to pay the debt of the heirs.

COLLIER, C. J.—It is provided by the statute of Frauds, that "No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer any debt or damage out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person," &c., "unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised."—Clay's Dig. 254, § 1. In Violett v. Patton, 5 Cranch, 142, it was insisted that a written undertaking to pay the debt of another must state the consideration as well as the promise, according to the decision of Wain v. Warlters, 5 East. Rep. 10; but Chief Justice Marshall said, "the first section of the act of Virginia" (under which the question arose) "differs from the 4th section of the statute of Charles II. in one essential respect. The statute of England enacts, that no action shall be brought

in the cases specified, "unless the *agreement* on which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. The Virginia act enacts that no action shall be brought in the specified cases, unless the *promise* or agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. The reasoning of the judges, in the cases in which they have decided that the consideration ought to be in writing, turns upon the word *agreement*, of which the consideration forms an integral part. This reasoning does not apply to the act of Virginia, in which the word *promise* is introduced. Our statute in this respect is a transcript of that of Virginia, and if Wain v. Warlters is a correct exposition of the act of Parliament, it is not in point in the case before us. So in Massachusetts it has been held, that a promise to pay the debt of another, made in writing and signed by the party intended to be bound, is a sufficient compliance with the statute of Frauds; that although the consideration is not stated, it may be proved by evidence *aliunde*. Lent v. Padelford, 10 Mass. Rep. 230; Packard v. Richardson, 17 Mass. Rep. 122. Such is also the settled interpretation of the act in some of the other States; and we are not aware that the opposite doctrine is maintained in any of them, unless it be under the influence of a statute similar to that of Charles II. Fyler v. Givens, Riley's Rep. 56, and 3 Hill's Rep. (S. C.) 48; Woodward v. Pickett, Dudley's Rep. 30; Wren v. Pearce, 4 S. & Marsh. Rep. 91; Gilman v. Kibler, 5 Hump. Rep. 19. To these citations we might add others to which we have been referred by the counsel for the plaintiff in error; but the decisions are too uniform to make it necessary to amplify the point.

In our courts of original jurisdiction, the case of Violett v. Patton has been considered as founded upon correct reasoning, and strictly applicable to our statute. We think it has been too generally followed and acquiesced in by the bar and the bench to be now disregarded, and the English decision substituted. Under the influence of this opinion, we are constrained to conclude that the writing declared on is a sufficient promise to charge the defendant, if it is sustained by an adequate consideration; consequently the case made by the declaration, is not obnoxious to the statute of frauds.

We now propose to consider whether the note imports a consideration, and whether the *onus* of sustaining, or assailing it, rests primarily upon the plaintiff or defendant. It is enacted by a statute passed in 1811, "whenever suit shall be commenced in any of the courts, founded on any writing, whether the same be under seal or not, the court before whom the same is depending, shall receive such writing as evidence of the debt or duty for which it was given," &c. Clay's Dig. 340 § 152. In Click v. McAfee, 7 Port. 62, the plaintiff declared on a promisory note by which the defendant promised to pay him "six hundred and forty dollars and seventy-five cents for this amount due him by Richard Tarrant." It was held, that this was a promise to pay the debt of another person, and if it had not been in writing, would be within the statute of frauds; yet as the act of 1811, had made every writing which is the foundation of an action, evidence of the debt or duty for which it was given, it was not necessary to allege the consideration in the declaration; that it devolved upon the defendant to put it in issue and controvert it by proof: *Further*, that a written promise to pay the debt of another was not validated by the statute of frauds, unless it was sustained by a consideration: that it was not intended by that enactment to make a mere *nudum pactum* an operative security. So in Nesbit v. Bradford, 6 Ala. Rep. 746, the action was founded on a guaranty endorsed on a bill single in the following words, "I bind myself to pay this note, if T. L. M., (the maker) does not:" Held, that the guaranty was a promise in writing, and as such, imports a consideration, and that in declaring on such a writing it is only necessary to set out the bill single with respect to which it was made, the guaranty according to its terms, or its legal effect, the facts from which diligence is to be infered, or the insolvency which renders diligence unnecessary, and a sufficient breach of the contract. In Miller & Cobb v. McIntyre, 9 Ala. Rep. 638, the plaintiff declared upon the indorsement of a bill single made in another State; it was insisted that as the paper was not negotiable at common law, the declaration should have set out the consideration of the indorsement: Held, that the act cited, was an answer to the argument; that this act does not interfere with the rights of parties, but merely prescribes a rule of evidence which must be applied to all

writings upon which suits are brought in our courts, no matter where made. This statute has received a liberal construction, and been applied to writings which do not in terms express the contract of the parties, but make the liability of the promissor to depend upon the performance of conditions implied by law. Chamberlain v. Darrington, 4 Port. [illegible] 515. These citations are directly in point, and very fully establish that a written promise to pay the debt of a third person may be declared on by the promissee without setting out the consideration which induced it; that if this was necessary at the common law, it is no longer so, since the passage of our statute, which makes the writing sued on, evidence of the *debt* or *duty*. It cannot be assumed, because the writing states that the sum agreed to be paid, was for services rendered to, or a debt due by a third person, that the promise is gratuitous; in the absence of all extrinsic evidence we have seen that a consideration will be presumed in the same manner as if no reference was made to the pre-existing liability of another.

It must be observed that the statute of frauds does not declare a *promise* or *agreement* to answer for the *debt*, *default* or *miscarriage* of another illegal, but merely enacts that no action shall be brought thereon, unless such *promise* or *agreement*, or some memoradum or note thereof shall be in writing, &c. In the case at bar, there is a written promise, and thus far the statute is complied with; as for the consideration, it need not be stated in the writing, and where the writing is the foundation of the action it is not necessary to be alleged in the declaration. The existence of a consideration is not negatived or an insufficient, or illegal one shown as it respects the parties, by the recital that the undertaking is to pay for services rendered a third person, for it cannot be intended that the promise did not evidence the discharge of the primary debtor, or that the promissor has not received an equivalent for it.

It results from the view taken of this case, that the demurrer to the declaration was improperly sustained. The judgment of the Circuit Court is consequently reversed, and the cause remanded.

Dargan, J, not sitting.

WILLIAMSON *vs.* CULPEPPER.

1. If W. borrows money from C., and transfers to him, "*as collateral security*" for its re-payment, the note of a third person, for nearly double the amount of the sum borrowed, with the condition that in case of W.'s default, "*C. is to hold the note as his own property*," such transfer, notwithstanding the condition, is to be deemed a security merely, and not a conditional sale.

Error to the County Court of Wilcox. Tried before the Hon. S. G. Cochran.

ASSUMPSIT by the plaintiff against the defendant in error. By bill of exceptions it appears, that the plaintiff in support of his action, read in evidence an instrument of which the following is a copy: "Received of R. H. Williamson a note on S. W. Portis, for five hundred dollars, due 17th day of April last, as collateral security for the sum of two hundred and ninety-five dollars and four cents, which amount is due on the first day of November next, and if the said R. H. Williamson shall cause the above stated sum to be paid on or before the first day of November next, the subscriber will give up the note, and if not, I shall hold the same as my property, May 26th 1846, Erasmus Culpepper," and proved that the said sum of two hundred and ninety-five dollars and four cents, was borrowed by him from the defendant on the day said instrment was executed, and that the defendant before the institution of this suit, had collected the full amount of Portis' note. It further appears, that plaintiff did not pay the sum of money borrowed by him according to contract. On this state of facts, the plaintiff asked the court to charge the jury, that the said instrument was a pledge of mortgage, and that he had a right to recover from the defendant the difference between the sum borrowed, and interest thereon, and the amount received by the defendant on the note of Portis, after deducting his reasonable expenses incurred in the collection thereof. This charge the court refused to give, but charged the jury, that the instrument was a conditional sale, and the plaintiff not having complied with the condition, was not entitled to recover. To

the refusal to charge as requested to and the charge given by the court, the plaintiff excepted, and now assigns them as error.

WATTS & JACKSON, for plaintiff:

1. This is an action for money had and received, which as a kind of *equitable* action is much favored and authorises the plaintiff to recover from the defendant any money that he may have in his hands which *ex equo et bono* belongs to plaintiff. Hitchcock, et als. v. Lukens. 8 Port. Rep. 333.

2. The instrument described in the replication to the second plea, and refered to in the bill of exceptions as having been proven on the trial, connected with the fact that there was a loan of money from the defendant to the plaintiff, shows it to be a mortgage, or pledge, and to have been so intended by the parties at the time of its execution, and not a conditional sale. Eiland, adm'r v. Radford, 7 Ala. Rep. 724; Sewall v. Henry, 9 do. 24, and authorities there cited. The instrument shows that the note of Portis' was received as "*collateral security*" merely—Williamson *was not discharged from his indebtedness to Culpepper*, and the amount of Portis' note *was nearly double that of Williamson's*. That Portis' note was worth the *nominal* amount, is shown from the fact of its speedy collection by Culpepper. These circumstances show that it was intended as a pledge or mortgage, *and not a conditional sale*. See authorities, *supra*.

SELLERS, for defendant.

CHILTON, J.—This agreement does not admit of the construction placed upon it by the County Court. Indeed it is scarcely open for construction as to whether it was a conditional sale or security, since it expressly states that Culpepper holds the note "as collateral security for the sum of two hundred and ninety-five dollars and four cents, due the 1st November 1846." If, however, the subsequent provision in the contract, "that on failure of the plaintiff in error to pay that sum on the day it falls due, the defendant was to hold the note on Portis' as his own property," rendered it of doubtful import as to the intention of the parties, according to the rules of law by which we are to be governed in determining whether it was their intention to create a security merely, or make a

conditional sale, we have no difficulty in construing this to be the former. 1st—The vendor continued bound for the debt which was collaterally secured by the note of Portis'. 2d The note on Portis was for double the amount of the demand secured, and 3d—The transaction commenced by borrowing money. In Eiland, adm'r v. Radford, 7 Ala. Rep. 726, it is said, " where any of these facts are found to exist, they go far to show, in a doubtful case, that a mortgage, and not a conditional sale was intended." Much more then will the conclusion be strengthened when so many concur in establishing it. Davis v. Phelps, 7 Monroe, 635; Sewall v. Henry, 9 Ala. Rep. 24; Freeman v. Baldwin 13 Ala. Rep. 253–4.

The plaintiff brings his action of assumpsit, and says that the defendant in recovering the amount of the note from Portis has funds in his hands, after satisfying his demand against the plaintiff and the incidental expenses, to a considerable amount, which *ex equo et bono* belong to the plaintiff. We think it no answer to the action, that although the note on Portis was received as collateral security, yet on the plaiutiff's failure to pay on a certain day, the note should belong to the defendant. This would amount to a forfeiture of double the amonnt of the demand, which the law regards as odious. Besides, to hold that the absolute property in the recovery vested in the defendant in error by the default in this case, would be to decide that what was intended and expressed to be a security for a loan merely became a conditional sale, from the form of the instrument as respects the forfeiture. It is well settled, that if a mortgage contain a clause converting it into a deed, if a sum of money is not paid, it does not thereby become a deed upon the happening of the contingency. Rankin v. Mortimer, 7 Watts, 372; 6 ib. 126; 8 Mass. 159. We think it very clear that the plaintiff is entitled to recover for the excess, after paying the demand for which the note of Portis stood as collateral and the expenses for collecting it. It follows that the charge asked should have been given, and that the court mistook the law in the charge given.

Judgment reversed, and cause remanded.

LEWIS *vs.* STEIN.

1. Where a statute prescribes a penalty for doing a particular act, to be recovered—one half to the use of the informer and the other half to the use of the party aggrieved—the latter may bring a common action of debt in his own name and recover the whole penalty. In such case, there is no need of resorting to the *qui tam* form of action.
2. One invested by grant from the government with title to land, through which a water course runs, acquires thereby no greater right to the use of the water than others, over whose premises the same stream passes, and cannot so use it as to corrupt or impair its quality to their prejudice or injury.
3. Will any length of time enable a party to prescribe for a nuisance—QUERE?
4. No grant, licence or authority to erect or continue a nuisance can be presumed from length of time, in opposition to repeated intermediate expressions of the Legislative will, prohibiting its erection.
5. It is a nuisance to throw from day to day into water, used for the ordinary purposes of life, any substance that renders it less pure and excites digust in those who use it.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

THIS was an action of debt commenced by the defendant against the plaintiff in error in a Justice's Court, to recover the penalty imposed by the act of 20th December 1820, for obstructing or injuring the waters of Three Mile Creek, near the city of Mobile, by permitting the saw-dust from his mill to fall therein. The justice before whom the suit was brought gave judgment against the plaintiff below for the costs, from which he took an appeal to the Circuit Court, where judgment was rendered in his favor. The remaining facts necessary to a full understanding of the case will be found in the opinion of the court.

RAPIER, for plaintiff in error.

1. The action was on a penal statute, by the party grieved, who proceeded for the whole penalty, when by the statute he was entitled to but a moiety. The action should have been *qui tam*. For this defect the court below ought to have dis-

missed the suit. See pamph. Acts 1841, p. 53; Toul. Digest, 795, § 4; 1 Ba. Abridg., Actions Qui Tam, 62; 1 Com. Dig. 324; 5 Mass. 53; 13 Mass. 221.

2. It was error to award to the plaintiff a judgment for the whole penalty. A party, whose right is statutory, may not have more than the statute gives him.

3. The evidence before the Circuit Court was loose, conflicting and uncertain, and was insufficient to establish an injury. If an injury might have been infered, it was too trivial to warrant a judgment.

4. The constitution of Alabama, like that of the United States, provides that private property shall not be taken or applied to public use, unless just compensation be made therefor. See Art. 1 Const. Ala. § 13, and Art. 5 of Amendts. to Const. U. S. And it is conceived to be equally beyond the scope of Legislative power, to authorise a proceeding which will indirectly avert from the owner the use and free control of his property, or to authorise the direct appropriation thereof without providing compensation. What may not be done directly may not be done indirectly. 5 Wend. 423; 17 Johns. 215.

5. The mill had been erected by the father of Lewis more than twenty years before the grant of Stein's charter, and near thirty years before the commencement of this suit, and has always been of the same plan; and the saw-dust has ever fallen into the creek in the same manner. Under such circumstances the law presumes a grant to the ancestor of Lewis, and the grant will be presumed to be commensurate with the rights actually enjoyed. See Palmer v. Mulligan, 3 Caines, 316; 7 Phillips' Ev. 165; Braly v. Shaw, 6 East. 213; 1 Campb. 463; 3 ib. 80; 4 Day (Conn) 244; 1 Lord Raymond, 741; 3 Saund. 429; 2 Wend. 13; 5 ib. 423; 17 Johns. 211; 2 Dallas, 304; 7 Cranch. 164.

6. A grant is a contract: a law impairing any of the rights held by virtue of a grant, without providing compensation, is unconstitutional. See Fletcher v. Peck, 6 Cranch, 136.

7. The mill, operated as it is, is no nuisance; and if it were, the nuisance cannot be abated in this way. See 3 Caines, 316; Rex v. Pease, 4 Barn. & Adol. 30; 22 Pick. 75; 17 ib. 164; 2 ib. 51, 57; 14 Mass. 49; 2 S. & P. 199.

HAMILTON, HOPKINS and PERCY WALKER, for defendant:

1. An informer must sue a *qui tam* action, and show for whom, besides himself, he does sue, to protect and secure by the judgment the right of the third person, who is entitled to one half of the penalty. When the defendant sued, there was no necessity to pursue the *qui tam* form. The defendant stood in the place of the city of Mobile, entitled to half the penalty, where an informer brought the suit; and by bringing the suit himself, he became entitled to what would be an informer's share, to-wit, the other half. The reason for the *qui tam* form therefore ceased, and he could sue in the ordinary action of debt. 3 Salk. 6; 1 Chit. Pl. 113, 371; Wiswall v. Ross, 4 Por. 321, 326, 327.

2. One having even a prescriptive right to the use of water must use it so as not to injure others. 9 Conn. Rep. 291, 307; 10 Johns. Rep. 137, 251; Angel on Water Courses, 135, 136; 7 Cowen, 349, 385. The act of the plaintiff in error was a nuisance, for which he was liable to the defendant, who was injured by it. Angel on Water Courses, 136; 4 McCord's Rep. 472; 10 Pick. 385; 19 ib. 147; 9 Wend. 315. And the right of an injured person to damages exists, whether they be direct or consequential. 1 Binney, 463; 2 Rawle, 83; 6 Porter's Rep. 472, 496, 498, 499, 502, 503; 7 ib. 247.

3. Twenty years possession will not authorise the continuance of a nuisance. 7 East. 195; 10 Johns. 147; 1 Stew. 133; 9 Conn. Rep. 291; 2 Watts' Rep. 247. The presumption of a grant does not arise in a case involving a public right. Angel on Water Courses, 83.

4. The right to the use of the waters of a stream is common to all the owners of the adjacent lands, and is *incidental to the possession* of the lands, and a severance of the right can only be had by consent of those interested. The United States have no other right as landholders than this common law right, which belongs to individual proprietors, all of whom, by the common law, have the same right to waters flowing through their lands. One cannot be permitted to use this right to the injury or the annoyance of another proprietor. 6 Porter, 472, 473, 496, 497. The United States can grant no right to a purchaser which does not belong to them. 6 Porter, 472.

5. As no order of the proper court was shown for the build-

ing of the mill, Lewis exercised his common law right to build at his peril, and subject to the liability of paying any damage or legal penalty for injuring others. 7 Porter, 247; 6 ib. 496, 497.

DARGAN, J.—It is contended that this suit is improperly brought in the name of Stein, who does not sue as an informer. By the 4th section of the act of the 20th December 1820, entitled "An Act to incorporate an Aqueduct Company in the city of Mobile," it is provided, that if any person shall obstruct or injure the waters of Three Mile Creek (on which this saw-mill is situated) by logs, bushes, earth, or other materials, between its source and the place where the water is taken for the use of the city, he, she or they, for every such offence, shall forfeit and pay the sum of twenty dollars, to be recovered by action of debt, &c.—one half of which shall go to the city of Mobile, and the other half to the informer. The plaintiff entered into a contract with the city authorities, on the 26th December 1840, by which he became the lessee of the water-works for the term of twenty years. This contract was submitted to the Legislature of the State, and by the act of the 17th January 1841, was ratified and confirmed, and all the rights, powers, privileges and immunities that had been granted to the Mobile Aqueduct Company and the city of Mobile by the act of 1820, were granted to the plaintiff, to be by him enjoyed during the term of his lease. In addition to the act of 1841, the plaintiff by the act of the 4th of February 1846, is authorised to sue for all dues, demands, forfeitures, &c., to which he may be entitled under the contract entered into between him and the city, before any Justice of the Peace of Mobile county, or any court having competent jurisdiction.—Under this contract and these several acts, it is clear that the plaintiff is entitled to all the rights and benefits granted and confered by the act of the 20th December 1820, and is entitled to one half of any forfeiture incurred under the 4th section thereof, if such forfeiture be sued for by a common informer. He occupies the place and stead of the city during his lease, is possessed of all the rights that had been previously confered on the city in reference to the water-works, and, if a forfeiture is recovered by a common informer, entitled to the half that

previously belonged to the city of Mobile. This is the obvious construction of the acts of the 17th January 1841, and of the 4th February 1846. There is nothing whatever to be gleaned from any of the acts, that would deny to Stein the right to sue for a penalty incurred under the 4th section of the act of December 1820. He may then, as may any other individual, sue for and recover the penalty given by that act. If any one else, however, sues for it, one half when recovered will belong to Stein, the other half to him who sues for and recovers the same. If Stein himself brings the suit, as he may do, there being no prohibition of his right to sue, he then becomes entitled to the whole penalty. Being entitled to the whole penalty, when he brings the suit, he may sue as he would in any common action of debt, and the commencement of his declaration is the same. 3 Salk. 6; 1 Chit. Pl. 371, 113; 3 Blackstone, 140. The suit is therefore properly brought in the name of Stein, without stating that he sues *qui tam*, or as an informer, for by bringing the suit he is entitled to the whole penalty, if recovered.

2. The evidence shows that the defendant and his father, to whose rights he succeeded, have been in the quiet possession of the mill and the land on which it is situated, for near thirty years; that the plan of the mill has not been altered; and that the saw-dust has been permitted to fall into the creek from the time of its erection; and it is urged that this possession of the mill not only raises the presumption of a grant to the land, but also gives the defendant the right to continue the mill, without any modification or alteration, although the saw-dust may fall into the creek, and the quality of the water may be thereby impaired. As there was no opposing title shown to the land on which the mill is situated, we will examine the question on the presumption that the ancestor of the defendant held the land by grant from the Government. The grantee from the United States of land, over which a stream of running water passes, acquires no other rights to the property than any other grantee in fee, and those are, an absolute title to the land, and the right in common with all others, over whose land the water passes, to its use. This is all the defendant can claim by virtue of a grant from the Federal Government, and this much is possessed by any owner of the land over which the stream

runs. Hendricks v. Johnson, 6 Porter, 472. Being owner of the land over which a stream of water flows, he has the right to use the water, but as this right is common to all the riparian owners, no one of them, by virtue of his title to the land and his right to use the water incident thereto, can claim to use the water so as to corrupt or impair its quality to the prejudice or injury of the others. Angel on Water Courses, 20; Howell v. McCoy, 3 Rawle, 256. The defendant, therefore, cannot claim the right to injure the water by virtue of any title to the land, *from whatever source derived.* It is true, he acquired the right to erect a mill on the creek, and to use the water for this purpose, but the rights of those below him forbade him so to construct it as to render *the water impure*, or to corrupt or injure its quality.

3. Nor do we think that the length of time, during which the defendant has been permitted to let the saw-dust fall from his mill into the creek, can exempt him from the penalty of the 4th section of the act of 1820, if in truth the qualities of the water are *impaired by it.* In the case of Mills v. Hall, 9 Wend. 315, the facts were, that the defendant had built a dam across a stream, which it was alleged corrupted the atmosphere and affected the health of the plaintff and his family, and one of the grounds of the defence was that the dam had been erected more than twenty years. The court said, that there could be no such thing as a prescriptive right to maintain a public nuisance, and although the dam may have been erected more than twenty years, and during all the time has rendered the adjacent country unhealthy, yet such length of time can form no defence to the right of the public to abate it, nor to an action at the suit of any one who has suffered by it, although such length of time would form a bar to any action to recover damages for overflowing the land of an adjoining owner by reason of the erection of the dam. Again, in the case of the People v. Cunningham, 1 Denio, 524, it is said, that no length of time will enable a party to prescribe for a nuisance. See also Hey v. Sterrett, 2 Watts, 327.

4. It is not, however, necessary that we should assume the broad principle, that no length of time will justify the continuance of a nuisance. If it can be continued on the ground of the length of time that it has been permitted to exist or con-

tinue, it must be that a grant is presumed to have been obtained for the erection of the nuisance, or a license or authority from the public to do the act constituting the offence. But in this case no such presumption could be indulged, for in a short time after the mill was erected, the Legislature of the State passed the act under which this suit is brought, imposing a penalty on any one who should obstruct or injure the waters of the creek, on which the defendant's father had then erected the mill. This act is still in force, and has been by several subsequent acts recognised as an existing law. We then have the clear and unequivocal evidence of the Legislative will, that no one should injure the waters of this particular stream. In opposition to this act, prohibiting an injury to the water, we cannot infer a grant or authority to do so in violation of the act.

5. The only remaining question is, whether the evidence shows that the saw-dust injures the water. The witnesses state that the filmy substance found in the water was created entirely or in part by the saw-dust; to what extent this substance impairs the sanatory qualities of the water, the witnesses do not know; one who was a physician thought it did not render the water less healthful. We, however, think that the existence of such a substance in the water is an injury to it; to say the least, it renders the water less pure, and is calculated to annoy and disgust those who have it to use for the ordinary purposes of life, and consequently must be an injury to it.

The counsel for the plaintiff in error, however, has urged that to enforce the penalty of this act against the defendant will compel him to abandon the use of his mill or alter its structure at considerable expense, and thus private property will be taken or destroyed for the public good, without compensation. The whole error of this argument consists in not reflecting on the strict rights of the defendant. He had the right, by virtue of his title to the land, to use the water, but not to abuse it to the injury of others. By his act he not only uses it, but, as the evidence shows, injures its quality. This he had no right to do; he obtained no such right by virtue of his grant to the land, nor has he derived any such right or authority from any source having power to grant it. He there-

fore has incurred the penalty by infringing upon the rights of others, in injuring the water, and for this he must be responsible.

We see no error in the judgment, and it must be affirmed.

JONES, Adm'r., *vs.* DEYER & WIFE.

1. A promissory note may be the subject of a gift *inter vivos* or *causa mortis*, but, in either case, an actual delivery to the donee, or to a third person for him, is essential to its validity.
2. If an overseer, employed at a stipulated price per annum, is sick a part of the time, and thus unfitted for active service, the employer may recoupe the damages sustained by the imperfect performance of the contract.
3. It is competent for an executor or administrator to submit to arbitration a controversy in which the estate is concerned.
4. Where, upon final settlement of an estate, a contest arises between the administrator and distributees, as to whether a particular fund is assets of the estate or belongs to the administrator individually, and a decision is made in favor of the distributees, the administrator is personally liable for the costs of the proceeding.
5. If distributees except to the administrator's account, and seek to charge him beyond the amount with which the administrator has debited himself, but fail to produce any evidence in support of the exception, it is proper to charge them with the costs consequent thereon.

Error to the Orphans' Court of Limestone. Tried before the Hon. Wm. H. Walker, Judge.

The plaintiff in error, as administrator, with the will annexed, of Patrocleus Lewis, deceased, rendered his accounts and vouchers to the Orphans' Court of Limestone for a final settlement of his administration. The defendants in error, Andrew J. Deyer and Jane his wife, the latter of whom is the daughter of the said Patrocleus Lewis, and sole legatee under his will, denied the correctness of the administrator's account, and suggested; 1st, that he had failed to charge himself with the sum of $1200, being a balance on a note or bond for a large amount, made by one Samuel Jordan, deceased, in

his life time to said Patrocleus Lewis, and which the latter left as a part of his assets at the time of his death: 2d, that the said Patrocleus Lewis was the overseer of the plaintiff and Eliza Jordan executrix of said Samuel Jordan for the years 1842, 1843, and until his death in August 1844, at a salary of $500 per annum, and that said administrator had charged himself with $250 only per annum, when he should have charged himself with $500 per annum. A number of depositions were taken by each party, from which the following facts may be gleaned: Patrocleus Lewis in his life time, frequently expressed great regard for the plaintiff in error on account of his and his father's kindness to him: on the night before his death, Dr. Achilles Whitlock, his attending physician, was engaged with him in looking over his (Lewis') papers in a room of the said Eliza Jordan's house, where said Lewis lived: after being thus engaged for some time, Dr. Whitlock carried to Mrs. Jordan, who was in another room, the note or bond of said Samuel Jordan, her testator, with a credit of $1200 endorsed on it, and signed "A. W. per instruction of P. Lewis," and at the same time presented to her a sealed note for $1200, payable to Samuel J. Jones, the plaintiff in error, which he requested her to sign, and which she did. Dr. Whitlock had died some time before the trial, and although Jones boarded at the same house with Lewis, was frequently with him and very attentive to him, it does not appear whether he was in his room at the time of this transaction, or how or when he came into the possession of Mrs. Jordan's note, further than that he had possession of it after he assumed the administration of the estate. Patrocleus Lewis had been the overseer of Samuel Jordan before Jordan's death, at a salary of $500 per year, and after his death superintended the plantation belonging to his estate, as well as the plantation of the plaintiff in error, in 1842, 1843, and until his death in 1844, but he was never employed by Mrs. Jerdan, the executrix of Samuel Jordan. During the years named, Lewis was in very bad health, so much so, as to be incapable of attending to regular business, and was often confined to his bed. A witness examined by the defendants in error stated, that since this controversy arose, the plaintiff in error told him, that Lewis was getting $500 a year for man-

aging the places of Jordan and plaintiff, but all the witnesses who gave an opinion on the subject testified, that in his then state of health, $250 a year, was a full and fair compensation for his services. It also appears that the plaintiff in error and Mrs. Jordan submitted the question as to the amount of Lewis' compensation to the arbitration of two persons, who fixed it at $250 per annum.

The court charged the administrator with the $1200, with $150 per year, in addition to the sum, with which he had already charged himself, for the services of Lewis as overseer, and with the entire costs of the proceedings: each of which is now assigned as error.

C. C. Clay, Jr. for the plaintiff:

1. There can be no doubt that Achilles Whitlock entered the credit on Samuel Jordan's note and wrote the new note of Mrs. Jordan, as the agent of Lewis. An agent may be created verbally, and agency may be infered from the relation of the parties and the nature of the employment. 2 Kent's Com. 613–14; 11 Mass. 97; 15 East, 400.

2. The mere possession of the note is *prima facie* proof of Whitlock's authority to enter the credit. Erick v. Johnson and Trustee, 6 Mass. 193–6.

3. The gift by Lewis was not a *testamentary* act—it did not require the assent of an executor to perfect it—nor a *donatio mortis causa:* Lewis could not have revoked it or recovered it by suit at law or bill in chancery, had he lived and attempted to do so. A party cannot deny his own deed, save for fraud or mistake in the execution of it. Whether a gift or a contract, it was *executed* by Lewis in his life time—he could not have disposed of it by will. If a gift, it was perfected by delivery to Jones, or to Whitlock for him, or by what was equivalent thereto—even if the possession remained with the grantor, it was irrevocable. Smith v. Wiggins, 3 Stew. 121; McCutchen v. McCutchen, 9 Port. 650; Sims v. Sims, adm'r 8 Port. 449; 2 Kent's Com. 440; Sewall by next friend, v. Glidden, 1 Ala. Rep. 59.

4. Sickness prevented Jones from performing his duties as an overseer, and it was charitable forbearance on the part of Mrs Jordan to suffer him to stay on the place. In this view of the

facts, the case of Martin v. Everett, 11 Ala. Rep. 375, is inapplicable.

5. It was advantageous to the heirs of Lewis to arbitrate with Mrs. Jordan the question of his wages, for the proof shows that he could not have recovered as much as $250 per annum by sueing her, and therefore it should have been sanctioned by the court. 1 Lomax's Ex'rs, 356; 1 Brock. 228; 6 Leigh, 487.

6. The court should not have charged the administrator with the *costs* of the settlement, unless he was guilty of a *devastavit*, or of laches in his settlement. He did settle his administration within a reasonable time after taking letters of administration. As a general proposition, an administrator is entitled to his costs. 9 Porter, 667; 7 Ala. 617. If he is not chargeable with the $1200 or $400, then there is no imputation or room for imputation of an abuse of his trust. Besides, the court allowed him the usual commissions, yet charged him with the costs of settlement, which is irreconcilable. If he deserved commissions, he certainly was not chargeable with costs.

Wm. Cooper, for defendants.

COLLIER, C. J.—1. It has been so often decided as to have become a legal axiom, that it is indispensable to a *parol* gift of a chattel, that there should be an actual delivery of the thing. Sims v. Sims' adm'r 2 Ala. Rep. 117, and cases there cited; Easley v. Dye, 14 Ala. Rep. 158; Pitts v. Mangum, 2 Bailey's Rep. 588; Fowler v. Stuart, 1 McC. Rep. 504; Ewing v. Ewing, 2 Leigh's Rep. 337; Pearson v. Pearson, 7 Johns. Rep. 26. To constitute an effectual delivery, the donor must part with the dominion of the thing in favor of the donee. A bare intention to give, no matter how decidedly formed or how often expressed, is insufficient to invest the intended donee with a title. Phillips v. McGrew, 13 Ala. Rep. 255. In Gragniac v. Arden, 10 Johns. Rep. 293, a father bought a ticket in a lottery, which he declared he gave to his infant daughter E., wrote her name upon it, and after the ticket had drawn a prize, he still declared that he had given it to his child E., and that the prize money was hers: this was held

sufficient for a jury to infer all the formality requisite to a valid gift, and that the title to the money was vested in the daughter. Where there are circumstances which raise a doubt whether the donor who still retains possession of property did not intend to part with all control over it, the case should be left to the jury. McGinney v. Wallace, Riley's Rep. 290.

When a gift of personal property is made by deed, the delivery of the deed is sufficient though the donor does not part with the possession of the property. McRae, adm'r v. Pegues, adm'r, 4 Ala. Rep. 158; Newman v. James and Newman, 12 Ala. Rep. 29. A valid gift may be made *inter vivos* of a promissory note payable to the order of the donor by delivery merely, without endorsement or other writing. Grover v. Grover, 24 Pick. Rep. 261: In Elam v. Keen, 4 Leigh's 333, the owner of a bond which was in suit, and for which he held the attorney's receipt, told plaintiff that he might have the bond, and delivered him the attorney's receipt for it, instead of the bond itself, which was then filed in the suit in court. No consideration was given by the plaintiff for the bond: *Held*, that this was a valid gift, and that the plaintiff was entitled to the money collected on the bond.

So it is essential to a gift *causa mortis*, that there should be an actual delivery, but it may be made to a third person for the use of the donee, if the third person retain the possession up to the time of the donor's death. Borneman v. Sidlinger, 3 Shep. Rep. 429: See Holley v. Adams, 16 Verm. Rep. 206; Windows v. Mitchell, 1 Murph. Rep. 127; McDowell v. Murdock, 1 N. & McC. Rep. 237; Raymond v. Sellick, 10 Conn. Rep. 480; Nicholas v. Adams, 2 Whart. Rep. 17. Where one person made a note and delivered it to a third, to be delivered to the payee after the maker's death, it was held that it was not a good *donatio causa mortis*, because there was no delivery. Bowers v. Hurd, 10 Mass. Rep. 427. In Parish v. Stone, 14 Pick. Rep. 198, it was decided that the donor's own promissory note could not be the subject of a *donatio causa mortis*. But in Wright v. Wright, 1 Cow. Rep. 598, the testator in his last illness, and in expectation of death, made and delivered his note without consideration intending it as a gift: *Held*, that it was valid as a *donatio causa mortis*, and the payee might

sustain an action thereon against the executor of the maker. See Wells v. Tucker, 3 Binn. Rep. 366; Holley v. Adams, *supra.*

Conceding that Dr. Whitlock in taking the note of Mrs. Jordan payable to the plaintiff in error, and in endorsing a credit on the note of her testator to a corresponding amount, acted by the intestate's directions, and still there is an absence of evidence to show a delivery of the note to the plaintiff, or any one for him. So that whether we consider the change of security by the new note, and extinguishment *pro tanto* of the old one, as a *pure gift*, or *donatio causa mortis*, it is alike incomplete and ineffectual—the transaction wants the indispensable element of delivery. It may be that the intestate under the influence of grateful feelings, intended to make the plaintiff the beneficiary of his bounty, or under a sense of moral duty he may have desired to make the plaintiff the dispenser of his bounty to others (of which there is some intimation in the record.) However this may be, it is unnecessary even to conjecture, as he consummated neither of the purposes, nor did any act which invested the plaintiff in his individual right with a title to the note of Mrs. Jordan, or its proceeds. The beneficial interest in that note was vested in the administrator as such, and if necessary he could sue in the payee's name generally, or for the use of himself as administrator, but no matter by what form of proceeding he collected the money, he would hold it as assets of the estate he represented. This is so clear a sequence from the citations we have made and the evidence recited in the record, that it is needless to add more upon the point.

2. The only evidence that the price of Lewis' wages was stipulated, is drawn from the testimony of B. L. Bennett, who was examined as a witness against the administrator. He states that Lewis was overseer of the hands which belonged to S. Jordan, deceased, in 1842, '43, and '44, to August of the latter year, when he died; that the administrator told him in 1848, that he, (Lewis) "was getting $500 for overseeing the places" of Jordan and his, (the administrator's) plantation. Mrs. Jordan who was the executrix of her husband, admits that Lewis lived upon the plantation from 1842 until his death, but affirms, that he was not employed as an overseer by her.

She also states that she heard Lewis say, that one hundred dollars should be deducted from his yearly wages: All the witnesses concur that his health was bad, and perhaps the most of them state that he was often confined to his bed from 1842, up to the time of his death—some times for weeks or months; that his services were worth but little—not more than his board and the services of the negro man who attended him: all which were furnished him by Mrs. Jordan. Upon this evidence the Orphans' Court was not authorised to charge the administrator of Lewis with four hundred dollars a year for 1842 and '43, and at that rate up to the period of his death in 1844. Certainly, the sum with which the administrator charged himself in the account rendered, was quite enough to compensate the services of his intestate. Even conceding that the price at which the intestate was first employed, was five hundred dollars a year, and still it was competent to recoup the damages for that and the succeeding years, by evidence that bad health disabled him to perform active duty, or efficiently devote himself to the business of his employer. In Hunter v. Waldron, 7 Ala. Rep. 753, it was decided, that where an overseer employed at a stipulated sum *per annum*, is sick a part of the year, so as to unfit him for active duty, but he is permitted to remain in the service of his employer up to the end of the year, he is entitled to a *pro rata* compensation. If the employer has been injured by the imperfect performance of the overseer's undertaking, the damages may be recouped, so as to compensate the injury. Here is a case directly in point, and it furnishes a complete answer to the argument, that to entitle the administrator to reduce the recovery against him below the stipulated wages, it should appear not only that his intestate lost time by sickness, but was dismissed from service.

It is needless to consider the effect of the arbitration between Mrs. Jordan and the administrator, for the purpose of adjusting the intestate's compensation; or whether as the interest of both of them required the smallest sum to be agreed on, the award is not invalid—*there being no real controversy.* As a general rule, it is clearly competent for an executor or administrator to submit to arbitration any controversy concerning the estate, whether the claim be for or against it. 1 Lomax on Ex'rs, 356.

3. Mr. Lomax in his treatise on the law of executors, &c. (1 vol. 124,) says, it is stated in the English books to be only under special circumstances, that the Ecclesiastical Court directs costs to be paid out of the estate of the deceased, and that it is only in modern times that the court has found itself authorised to do so. It does not follow that a party is entitled to his costs out of the estate, because there was *jus causa litigandi;* but the principle which guides the court in decreeing such costs is, that the party was led into the contest by the state in which the deceased left his papers: *Further*, the general rule is, that executors and administrators who conduct themselves fairly are entitled to costs; but where there is misbehaviour on their part, they shall not be allowed costs out of the estate in their hands. So if a suit is occasioned by the negligence of the executor or administrator, the estate shall not be charged with the costs. 2d vol. Id. 501.

In civil actions the successful party in this State, is entitled to full costs, except where it is otherwise directed by law. Clay's Digest, 316 § 20. In a court of equity, the costs shall be paid by either party at the discretion of the court. Id. 350 § 26. The estate of a deceased person is made chargeable with the costs and expenses of settling the same. Id. 191 § 1.

It must be admitted that the citations from the English law and our statutes are neither directly in point, yet they furnish analogies, more pertinent perhaps, than any that have fallen under our notice. In respect to Mrs. Jordan's note for twelve hundred dollars, it was not returned in the account of the administrator as part of the assets of his intestate's estate, and upon exception to the account in this particular, he denied that it belonged to the estate, but insisted that it was his individual property under a gift from his intestate. The controversy which grew out of this exception, so far from being beneficial to the estate, if the administrator was successful, was directly the reverse; it was in fact a litigation in which the administrator and legatee were personally and individually interested. If the former succeeded he would gain the amount of the note and interest, and thus far the estate would be diminished, but if the latter recovered, she would charge the administrator to the extent of her recovery. The result was to falsify the administrator's account and to determine

the right of the legatee to be paramount to his; as he did not defend the interests of the estate thus far, he should not be allowed by the Orphans' Court to retain his costs from the assets.

The costs consequent upon the exception to the *debit* of two hundred and fifty dollars, as the amount of the annual wages of the intestate should be charged to the legatee, if for no other reason, because the exception was not sustained by evidence.

We know of no other mode of adjusting the costs of the proceedings in the Orphans' Court, so equitable as that we have stated. True, it may be difficult to ascertain with exactness which of the witnesses should be paid by the one party or the other; but this difficulty grows out of the case, and must be settled by the primary court, subject to revision to some extent by an appellate court. That a decree may be rendered according to the principles we have laid down, the decree is reversed, and the cause remanded.

BLISS *vs.* WATKINS.

1. Where judgments are rendered on the same day, in favor of different plaintiffs, neither is entitled to priority on the ground of *lien;* but if *one* of the plaintiffs first sues out execution and proceeds to a levy and sale of the land of the defendant, he will gain a preference over the *other*, by reason of his superior diligence, and must be first satisfied, notwithstanding the *other* may have placed his execution in the hands of the sheriff before the sale.
2. Whether a sheriff, who has levied on and advertised property under one execution, can sell under another, which has not been levied—QUERE?

Error to the Circuit Court of Sumter. Tried before the Hon. Samuel Chapman.

IN this case an application was made to the court by the sheriff of Sumter, for direction as to the appropriation of a sum of money in his hands, raised by sale under execution of the land of one Blake Little. The several judgment creditors ap-

peared, and submitted their respective claims to the judgment of the court, on an agreed state of facts, which, so far as they are necessary to a correct understanding of the point now involved, may be thus stated: The plaintiff and defendant respectively obtained judgments against said Little in the Circuit Court of Sumter, on the 8th May 1848, on each of which *fi. fas.* issued on the 1st June thereafter: The defendant's *fi. fa.* was placed in the hands of the sheriff on the 12th of June, and on the 29th of that month levied on the land of Little; and under this levy, and that of several other executions, the land was sold on the second Monday in October, and the money raised, which is the subject of this controversy. The plaintiff's *fi. fa.* was handed to himself, and never delivered to the sheriff, until the day the land was sold.

The court, after ordering satisfaction of other *fi. fas.* which, in its opinion, held liens superior to the lien of either plaintiff or defendant in error, awarded the priority to the lien of the defendant over that of the plaintiff, to which the latter excepted, and which he now assigns as error.

BALDWIN, for plaintiff:

If the claim of Russell, involved in this same case, to have the money applied to his execution, be allowed, as it seems to me it must, then this claim is without foundation. If that claim is disallowed, then we submit that our claim is unquestionable, to at least our proportion of the money—our lien on the land, out of the sale of which the money was raised, bearing the same date, and being equal to Watkins'. The fact that Bliss had other security is nothing, (Cocke v. Chaney, 14 Ala. 66,) certainly not in a court of law.

J. B. CLARK, for defendant:

1. A sheriff who advertises for sale on but one execution cannot sell under that and another execution coming subsequently to his hands, by virtue of the same advertisement.—Marteraft v. Van Antwerp, 3 Cowen's R. 334. Consequently, in this case no sale was made under Bliss' execution.

2. Where two judgments are rendered on the same day, and execution on one sued out and levied on land before the execution on the other judgment comes to the hands of the

officer, and the sale is made under the first execution, in the application of the money the first execution has the preference. Adams v. Dyer, 8 Johns. R. 347, marg.; Waterman v. Harkin, 11 Johns. R. 228, marg.

3. He who first sues out an execution, and begins to execute before others with equal judgment lien, turns the scale in his favor, and gains a priority by his superior vigilance. Burney v. Boyett, 1 Howard's Miss. R. 39; Waterman v. Harkin, 11 Johns. R. 228, marg.

4. I have not been able to examine the case of Cocke v. Chaney, cited upon the plaintiff's brief, but consider the principle very clear, that in case a creditor has a right to resort to two funds, he cannot so employ them as to injure a creditor who can only resort to one of them; and in the exercise of the power of applying money to the satisfaction of executions, the court possesses both legal and equitable powers. See Ramsey's Appeal, 2 Watts, 228; 2 U. S. Dig. 318, § 79.

CHILTON, J.—The sheriff, having doubts as to the correct appropriation of the funds collected by him upon a sale of land under executions in his hands, brings the money into court, and the parties in interest make an agreed case on which the Circuit Court awarded a distribution of the funds.

Russell and Tappan *et al.*, to whom the larger portion of the fund was adjudged, are satisfied with the decision. Bliss complains in this court that he is entitled to share *pro rata* with the defendant Watkins the sum which was adjudged by the Circuit Court to be paid by the sheriff to him. The judgments of Bliss and Watkins were both rendered on the same day, and as we are not advised which was first rendered, neither can claim a priority by reason of their judgments. It however appears that although the executions in both cases issued the same day, Bliss retained his execution until the day of sale of the land under the other executions. He insists that as the judgment gave the lien on the land, it is sufficient that his execution was in the officer's hands before the sale, to entitle him to share in the proceeds.

It seems to be well settled in New York, where judgments constitute a lien upon land, that where two judgments are rendered on the same day, although neither judgment creditor

has the preference as a *lien*, yet if one of the creditors first take out execution, and proceed to levy and sell, his execution must be first satisfied, by reason of his superior diligence, although the other creditor put his execution in the hands of the sheriff before the sale. Waterman v. Harkin, 11 Johns. Rep. 228; Adams v. Dyer, 8 ib. 347; see also Sanford v. Roan, 12 ib. 162; 1 How. Miss. Rep. 39. This question does not appear to have been directly decided by this court, notwithstanding the many decisions which have been made upon the subject of lien. The case of Patton v. Hayter, Johnson & Co., 15 Ala. Rep. 18, is in principle very nearly analogous; and if that and the decisions above cited are to be considered correct expositions of the law, it is clear that Bliss is not entitled to any portion of this fund. We think it difficult to distinguish in principle between a case where a party, claiming a lien by virtue of his judgment, holds the execution in his pocket, by which active interference the sheriff is prevented from making a levy, and one where, the *fi. fa.* being in the hands of the sheriff, the creditor instructs him to delay its execution. If Bliss had not interfered, and had permitted the clerk to have placed the *fi. fa.* in the sheriff's hands, or had himself, instead of holding it up from the first of June until the sale day in October following, placed it in the hands of the officer, it does not appear but that the sheriff would have made a levy sufficient to satisfy all the *fi. fas.* Be this as it may, where the liens created by the judgments are equal, the money should be awarded to the creditor who first begins execution of his judgment.—There is nothing unreasonable in this, and it is but carrying out the spirit of our statute in respect to the subject of lien.—It is giving the priority to the most vigilant, as is done by the statute in respect to personal property, which gives the preference to the party who first places his *fi. fa.* in the sheriff's hands, although it may have issued upon a junior judgment. So, where there are several executions, in favor of different persons, in the sheriff's hands at the same time, against the same defendant, and personal property is brought into the county, the lien of each *fi. fa.* attaches simultaneously, but in such case the most diligent, that is, the oldest judgment creditor takes the priority. Wood v. Garey, 5 Ala. Rep. 43.

We have not deemed it necessary to notice the question,

whether the fact that Bliss has other security for the payment of his judgment, to which he may resort, should not exclude him from sharing this fund. The point above noticed, we think, is conclusive of the case.

Whether the sheriff, having levied the executions of Watkins et al. and advertised to sell under them, could have proceeded, under such advertisement, to sell under Bliss' execution, upon which no levy or advertisement was made, is a question which we leave open. See, however, Martcraft v. Van Antwerp, 3 Cow. Rep. 334; Clay's Dig. 207, § 30.

Let the judgment be affirmed.

HARTLEY ET AL. *vs.* BLOODGOOD.

1. By the statute of 5th February 1846, a simple contract creditor is authorised to go into equity to subject the estate of his non-resident debtor, whether it be of a legal or equitable nature, to the payment of his demand; and where the interest sought to be condemned is an equitable fund in the hands of a trustee, it is no objection to the bill that, instead of the process of attachment, it prays an injunction against the trustee, restraining him from paying over such fund to the debtor.
2. Where a creditor seeks to subject to the payment of his demand the unascertained share of one of several distributees of an estate in the hands of the administrator, all the distributees are necessary parties to the bill.
3. Where the record does not contain the evidence on which a decree *pro confesso* against a non-resident defendant was rendered, a mere statement in the decree, that the publication was made in due form, is insufficient to sustain it.
4. Where a decree *pro confesso* has been regularly rendered against a defendant, it is not necessary to prove the existence and execution of a promissory note, which the bill alleges was made by him, as against a mere trustee in possession of the fund sought to be subjected to its payment.

Error to the Chancery Court of Butler. Tried before the Hon. Jos. W. Lesesne, chancellor.

THE bill alleges that William McDaniel, on the 27th day of

April 1837, executed his promissary note to one Henry Dickinson, for two thousand one hundred and thirty-eight dollars, payable on the first day of January 1840, with interest from date, which was transfered to the complainant by said Dickinson on the same day for a valuable consideration: that complainant is now the owner of said note, and that it has never been paid: that William McDaniel has left the State of Alabama, and now resides in Texas, and has resided there for several years: that McDaniel has no property in Alabama, out of which the money due on said note can be made at law, nor does complainant know of any property in the State of Texas out of which the money can be made; that Thomas McDaniel, the father of William, died in the year 1838, leaving a large amount of property, both real and personal, and several children: that Bartlett McDaniel was appointed administrator of his estate, and died in the year 1840, leaving the estate unsettled: that one John R. Hartly was afterwards appointed administrator *de bonis non*, and is still administrator: that an order to sell the real estate for the purpose of a more equal distribution thereof amongst the heirs has been obtained, but as yet the said estate has not been finally settled and distributed; and that said William is one of the heirs at law of said estate, and is entitled *to a large sum of money on the final settlement thereof*, which is now in the hands of said administrator, and that this is the only fund from which the money due on said note can be collected.

The bill prays an injunction against the administrator, restraining him from paying over the distributive share of William McDaniel to him, and that the interest of the said William, after a final settlement, be subjected to the payment of complainant's debt. The administrator and William McDaniel alone are made parties. The bill was sworn to, and bond given as directed by the chancellor, a subpœnea was served on the administrator and an order of publication was made against the debtor, William McDaniel. The administrator answered and demurred to the bill, and as one of the causes of demurrer assigned, that the other distributees of the estate should have been made parties to the bill. The demurrer was overruled and a decree was rendered in favor of complainant.

JUDGE, for plaintiff:

1. The bill has no equity, because: 1st—Complainant has no *equitable lien* to enforce, and before resorting to equity he must exhaust his legal remedies. Roper v. McCook & Robertson's adm'r, 7 Ala. Rep. 319, and the numerous authorities therein cited on this point. See also Owen v. Moore & Dobbins, 14 Ala. Rep. 640. And a defendant being a non resident, forms no exception to the rule; but if it does, complainant's case is not so stated as to bring it within the exception, as insolvency on the part of McDaniel, or inability to make the money out of him *in Texas*, is not positively avered. 2d, But for another reason the bill has no equity: "choses in action are not liable to execution, either in law or in equity." There must be some foundation for equitable interference, such as *trust, fraud*, &c. See Donovan v. Finn, et al, 1 Hop. Chan. Rep. 59, which is *precisely in point*, and a case very much like the one at bar. See also Hadden v. Spadder, 20 Johnson, 562. 3d—There is no allegation in the bill "that the ground, or cause of action, or the transaction on which the bill is brought took place in this State." Clay's Digest, 353, § 48. See also heirs of Holman v. Bank of Norfolk, 12 Ala. Rep. 370, 443. To bring the case at bar under the influence of this decision, there should be an averment in the bill, that William McDaniel "*asserts title*" in virtue of his right as distributee. He may have been *advanced*, and not desire further distribution by coming into *hotch-pot*. Besides, the note is the foundation of the controversy. 4th—The allegation of title to the note in complainant, is not sufficient; and the allegation made is not aided by an exhibit of the note, as was the case in Owen v. Moore & Dobbins, 14 Ala. Rep. 640.

2. Admitting that the bill has equity and still the decree was erroneous, because: 1st—There should have been personal service on William McDaniel, as the compulsory jurisdiction provided for by statute, can only be maintained when the foundation of the action takes place in this State. 2d—There is no proof that publication was ever made pursuant to the order for that purpose. There is no decree *pro confesso* in the record against the non-resident defendant. 3d—But if the recital in the decree is evidence that "publication was duly made," still *there is no recital therein that a copy of the order of*

publication was posted up at the court house, or that a copy was sent by mail to defendant McDaniel, his residence not having been unknown. Both these things are necessary to sustain the decree made by the chancellor. Butler v. Butler, 11 Ala. Rep. 668, which case is in point; 40th Rule Chan. Practice, Clay's Digest, 616. 4th—The decree for the amount assumed to be due on the note is erroneous; the note should have been *produced* and *proven*—neither was done; and when produced and proven, an account should have been directed to ascertain the amount due thereon. 5th—All the heirs and distributees of Thomas McDaniel's estate, and the claimants of William McDaniel's interest should have been made parties.

WATTS & JACKSON, for defendant:

1. The statute of 1846, pamphlet Acts, p. 17, authorises a simple contract creditor to file his bill without first obtaining a judgment at law, provided an affidavit is made by the complainant, of the amonnt of the indebtedness of the defendant and his non-residence. These requisites have been complied with in the present case. See the agreement of counsel attached to the bill as part of the record. The present bill was filed after the passage of the statute above refered to. The bond given substantially complies with the requisitions of the statute.

2. The other heirs of McDaniel's estate were neither *necessary nor proper* parties; *their* interests were not to be affected by the decree prayed for. The share of William McDaniel *alone*, AFTER final settlement of the estate, is sought to be condemned. Batre, et al, v. Auze's heirs, 5 Ala. 173.

3. It is further insisted by plaintiffs in error, that there is no equity in the bill, because it is not alleged that the ground, or cause of action, or transaction on which the bill is brought, took place in this State. As to this, we insist that the equitable interest of McDaniel in the estate against which a judgment *in rem* is sought, being in Alabama, is sufficient ground as contemplated by the statute. Heirs of Holman, et al, v. Bank of Norfolk, 12 Ala. Rep. 370; see the opinion on reargument of that case, 429, 430. This court will *presume* that McDaniel assented to the distributive share until a disclaimer is shown.

4. The recital in the decree that an interlocutory decree *pro confesso*, had been taken at a previous term of the court, after proper publication was made to bring McDaniel into court as a party, must be taken as true, although that fact may not appear in any other portion of the record. The decree shows that there was proof of publication. The language of the decree is that "proper publication was made to bring him McDaniel into this court as a party." This court will presume, from the above allegation in the decree, that every fact requisite to constitute proper publication, was proven *ore tenus* at the hearing, in accordance with the usual practice. The case of Butler v. Butler, 11 Ala. Rep. 668, is unlike this.

5. It was unnecessary to prove the note at the trial, for this must be taken as admitted by the decree *pro confesso*. See heirs of Holman, et al, v. Bank of Norfolk, *supra*, on page 432, and authorities there cited.

DARGAN, J.—As the complainant's demand is purely legal, being a simple contract debt, he cannot apply to a court of equity, independent of statute aid, for its collection, unless the object of the bill had been to enforce a lien against property bound for its payment. Saunders & McLaughlin v. Watson, 14 Ala. Rep. 198; Reese & Heylen v. Bradford, 13 Ala. Rep. 837, and the cases there cited. But by the Act of the 5th of February 1846, a creditor may, if his debtor be a non-resident of the State, file his bill in equity, although his debt be not reduced to judgment, to have the property of his debtor attached, whether it be real or personal, or whether his title be legal or equitable, and can subject the same to the satisfaction of his demand. Under this statute the bill contains equity, for although an attachment is not prayed, but an injunction only, yet we think that the fund sought to be condemned, being an equitable right to a sum of money, may be as well brought under the power and control of the court by an injunction, as in any other manner.

2. But when the title or interest of a debtor is of an equitable nature, the creditor who seeks to condemn it in satisfaction of his debt, must make all persons interested in the subject matter, parties to his bill, in order that they may have an opportunity to contest the right of the debtor. He should

make all persons parties whom it would be necessary to make parties, if the debtor, instead of the creditor, was the complainant. The other distributees of Thomas McDaniel, deceased, should therefore have been made defendants, in order that the Court of Chancery might be able to ascertain the amount to which William McDaniel was entitled, and thereby be enabled to decree payment directly from the administrator to the complainant without further proceedings or delay.

3. Where a defendant to a bill is a non-resident, and service has been perfected by causing publication to be made in the manner prescribed by the 40th rule of Chancery Practice, the complainant, if the defendant has failed to answer, will be entitled to a decree *pro confesso*, and as against him need not prove the allegations of his bill. Arnold v. Sheppard, 6 Ala. 299. But the record must show that the publication was made in the manner pointed out in the rule, or the decree cannot be sustained. It is true that if the recitals of the decree show that proof was made of those facts required to perfect service against a non-resident, we should not reverse because the evidence itself is not contained in the record, (Butler v. Butler, 11 Ala. 668); but the recitals must contain the facts necessary to constitute good service, and the mere statement that publication was made in due or proper form, is, in our opinion, insufficient, as it is an averment of a legal conclusion, rather than a statement of facts from which this conclusion would result. This record does not contain the evidence of publication, and the decree recites merely that proper publication was made. This recital is insufficient: it should have stated the manner in which it was made.

4th. We do not think it was necessary to prove the execution of the note as against Hartley. He is a mere trustee as to the interest of William McDaniel, whose interest only is sought to be subjected; and as the existence and execution of the note is established by a decree *pro confesso* against him, it is not necessary to prove it as against the trustee, for if the *cestui que trust* admits or confesses the right of the complainant, this must be conclusive on the trustee.

We do not deem it necessary to examine the other questions raised by the assignment of errors: they all relate to questions of practice, which will not probably again arise.—

The decree must be reversed, and the cause remanded, that the complainant may amend his bill by making the other distributees parties, if he sees fit to do so.

Doe ex Dem. KENNEDY'S EXECUTORS *vs.* TOWNSLEY'S HEIRS.

1. If the *second* proviso to the *third* section of the act of Congress of the 8th May 1832, "supplementary to the several acts for adjusting the claims to land and establishing land offices in the District east of the Island of New Orleans," be regarded as a limtation upon the provisions of that section, a donation claimant can take nothing under it, until the quantity of land to which he asserts a right has been first ascertained.
2. To invest a donation claimant, under the act of Congress of the 8th May 1832, with a title to his settlement, it is necessary that the land should have been surveyed, and its location and quantity ascertained, as provided in the *fourth* section of the act.
3. Statutes of limitations do not run against the Government, unless it is expressly named; nor against its grantee, until the Government has divested itself of the title.
4. To entitle a party to insist upon the statute of limitations, his possession must have been notorious, uninterrupted, and under an adverse claim of title for the period prescribed by the statute; and these are questions of fact for the determination of the jury.
5. According to the law in force in Mobile, whilst under the dominion of Spain, prescription must rest on "good faith and just title." A possession commenced by intrusion is deficient in both.
6. Can the title of the Government be divested by prescription?—Quere.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

This was an action of ejectment by the plaintiffs against the defendant in error to recover a lot of land in the city of Mobile. The plaintiffs deduced title under the act of Congress of the 5th May 1832, confirming to Joshua Kennedy a lot of land, of which the one in controversy is a part, a patent issued to him in accordance with that act in 1837, and the will of

said Kennedy. The defendant proved that the family of one Durett lived forty-eight years ago on a square of four acres, which was enclosed by a picket fence, and the improvements upon which looked to be very old; that Durett's family occupied the premises till 1823, when the lot mentioned in the declaration was sold off to one Acre, and conveyed to him by deed; and that said Acre and those claiming under him have been in possession, ever since, of the lot so conveyed. The defendants also introduced in evidence the 3d vol. of American State Papers, and read certain portions thereof, which are sufficiently recited in the opinion of the court, and proved that the parties had no other land claims in Mobile. This was all the evidence in the case.

The court charged the jury, that if they believed from the evidence that the defendants and those under whom they claimed had been in the peaceable and uninterrupted possession of the land in controversy for sixty years, they should find for the defendants.

The plaintiff's counsel requested the court to charge the jury—

1. That if they believed from the evidence that the defendants and those under whom they claimed set up no right under the British, French or Spanish Governments to authorise their possession, the plaintiffs ought to recover on their title.

2. That if they believed that the persons, under whom the defendants claimed, had no grant from the British, French or Spanish Governments, that they could not defend under their possession.

The court refused to give either of these charges, and instructed the jury that no grant was requisite to sanction their title under the length of possession.

To each of the charges given, and to the refusal to charge as requested, the plaintiffs excepted, and now assign them as error.

Campbell, for the plaintiffs:

1. No claim of title is of any avail to the defendants, so long as the land in question was held by the Government. 4 How. S. C. Rep. 169, 185; 7 Wend. 125; 4 Bibb, 554.

2. The title of the defendants under the donation contained

in the Act of 1822. 1 Clark. Land Laws, 820, § 4, required a survey and location before it became complete, and could not be ascertained on a location. 5 Howard S. C. R. 10, and 28; 4 do. 449–464; 4 Howard's S. C. Rep. 169; 8 Missouri, 88. The government of the United States retained the power to confirm and perfect an inchoate Spanish title until the title of the donation claimant was perfected by a survey and location. The consummation of the plaintiff's title by a patent, is the time from which the statute of limitations commences to run as between these parties. Cases above cited, also 3 Howard's S. C. R. 32.

3. A conveyance by the heirs of Durett to Acre, in 1823, before the perfection of their title by survey and location, confered no better title than they had in the bond upon Acre,—Acre only became an assignee of their equitable claim on the government to have the claim perfected by a survey; an unauthorised location by the heirs of Durett is a nullity. 4 How. S. C. R. 421.

4. The court charged, that length of possession alone, *without* claim of title, would create a bar. This charge is erroneous. 3 Wend. 337; 1 Digest N. Y. Reports, 33.

Lockwood, for defendants:

1. The patent introduced by plaintiffs, is not an ordinary one. It is simply a release of any claim the United States may have to the land contained in it, and expressly reserves the just claim of any and all persons to said land obtained from the United States, or from the British, Spanish or French Governments.

2. A direct grant from the Crown may be presumed on an uninterrupted possession for sixty years—2 Aust. 614; 1 Dow. Par. Ca. 322–323; or a prescriptive possession of Crown Lands for forty years—3 Dow. Par. Ca. 112. It is laid down as clear law that grants, letters patent, records, and even Acts of Parliament may all be presumed from length of time and continued possession. See 2 Dun. & East. 151, 158, 159; 3 McCord, 261; 6 East. 215; Rex v. Montague, 4 Bain. & Cress. 598; Lopez v. Andrew, 3 Mann & Pel. 329, note, a.; Schouber v. Jackson, *ex dem.* Bogart, 2 Wend. 13. Forty years adverse possession with some very slight additional cir-

cumstances, were put to the jury in North Carolina in 1801, as the basis on which they might presume a grant from the Crown, and they found one. *Den ex dem.* Hanks v. Tucker, Taylor, 157. The same in South Carolina—Allison, lessee v. Saunders, 1 Bog. 26. Proprietory grants, under certain circumstances, are presumed. They frequently derive their force and efficacy from that vigilance which the law guards ancient possessions, which sooner than they should be disturbed, presumes that they had, in contract, a righful commencement. Per Archer, J., in Beall's lessee, v. Lynn (Maryland) 6 Har & Johns. 361; Gitting's lessee v. Hall, 1 Har. & John. 14, 18. A patent or grant of land from the State which is matter of record has been presumed, after length of possession. Archer v. Sadler, 2 Hen. & Munf. 370; Dem on Hawkins v. Tucker, Taylor, 157. In an action of ejectment in which the plaintiff claimed under the great seal of the State, a prior grant of the defendant was presumed from uninterrupted possession. Allston, lessee, v. Saunders, 1 Bay. 26. A recovery which is a conveyance of record may be presumed. Hasledon v. Brodney, 2 Term, 159. What circumstances furnish a presumption of a grant, is a question of law, and it is the duty of the court to give an opinion, whether the facts proved will justify the presumption. Stoener v. Lessee of Whitman, 6 Binney, 416; Sumner, et al, v. Child, 2 Conn. 607. When a tenant at will was allowed to claim the presumption against the landlord's heirs, the tenant possessed 47 years after the landlord's death, and it was held, that the jury might presume a restoration of possession to the heirs, then an ouster, and so a title. Camp v. Camp, 5 Conn. 291, 301–2 and *seq.* Presumptions do not proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says, merely for the purpose and from the principle of quieting possession. Presumptions of grants may be used as an instrument to subserve the cause of justice, when from length of time, it is probable that the evidence of title is lost, or when it would be unreasonable to disturb a possession of long standing. Sumner v. Child, 2 Conn. 623. It is not necessary that the jury should presume who is the grantor, or what is the particular kind of grant. There can be no difficulty about a grantor, or grantee, or the forms of a grant.

They may presume such a grant as will quiet the possession. Lord Kenyon said, that he would presume not only *one*, but *one hundred* grants, to support such a long possession. Lord Ellenborough said he would presume *any thing* to support such a long possession. 11 East. 283; Sumner v. Child, 623, 2 Conn.

COLLIER, C. J.—The evidence of title adduced by the plaintiffs is confessedly sufficient to authorise them to recover, unless the defendants have shown a superior right, or such a possession as will avail them as a bar under the statute of limitations. To make out their defence, the defendants rely upon report No. 1, made to the Commissioner of the General Land Office by the Register and Receiver at Jackson Court House, Mississippi, under date the 11th July 1820, and the Act of Congress of the 8th May 1822, "supplementary to the several Acts for adjusting the claims to land, and establishing land offices in the districts east of the Island of New Orleans." The report is professedly "a list of actual settlers in the district east of Pearl river, in Louisiana, prior to the 3d of March 1819, who have no claims derived from either the French, British, or Spanish Governments;" and in this list we find the following: "No 44, Reps. of Durett, present claimant—Louis Durett, original claimant. April 1820—Date of present settlement. March 1790—Date of original settlement—Lot below Mobile, where situated." The first section of the Act of Congress enacts, that all claims to land derived from the British or Spanish authorities, reported to the Commissioner of the General Land Office by the Registers and Receivers at St. Helena and Jackson Court House, &c., which in their opinion are valid, shall be recognised as valid. By the second, it is provided that all claims reported as aforesaid, founded on orders of survey, &c., derived from the Spanish authorities, &c., shall be confirmed, &c. The third section is as follows: "That every person, or his or her legal representative, whose claim is comprised in the lists or registers of claims reported by the Registers and Receivers, and the persons embraced in the lists of actual settlers, or their legal representatives, not having any written evidence of claim reported as aforesaid, shall, when it appears by the said reports, or by the said lists, that the land

claimed or settled on, had been actually inhabited or cultivated by such person or persons in whose right he claims, on or before the fifteenth day of April, one thousand eight hundred and thirteen, be entitled to a grant for the land so claimed or settled on, as a donation: *Provided*, that not more than one track shall be thus granted to any one person, and the same shall not contain more than six hundred and forty acres; and that no lands shall be thus granted, which are claimed or recognised by the preceding sections of this act, or by virtue of the confirmation under an act entitled "An act for adjusting the claims to land, and establishing land offices in the districts east of the Island of New Orleans," approved on third day of March, eighteen hundred and nineteen: *And provided also*, that no claim shall be confirmed where the quantity was not ascertained, and report made thereon by the Registers and Receivers, prior to the twenty-fifth day of July, one thousand eight hundred and twenty." By the fourth section, Registers and Receivers, except in relation to perfect titles, as recognised, &c., are authorised to direct the manner in which the lands shall be located and surveyed, having regard to the laws, usages, &c., of the Spanish government, and also to the mode adopted by the government of the United States, under an act of Congress of the third of March 1803, entitled, &c: Where claims may conflict or interfere, the Registers and Receivers, may decide between the parties, &c. The fifth section directs that patents shall be granted for lands confirmed by the act in the same manner as under previous enactments to which it is a supplement; and the sixth provides, "that to every person who shall appear to be entitled to a tract of land under the second and third sections of this act, a certificate shall be granted by the Register and Receiver of the district in which the land lies, setting forth the nature of the claim and the quantity allowed."

If the second proviso to the third section be regarded as a limitation upon it, and restricts grants as donations to cases where the quantity of the land was ascertained and reported previous to the 25th July 1820, then it is clear that the defendants can claim nothing under the report and act of Congress; for it does not appear that the quantity to which the representatives of Durett asserted a right, has been ascertained. The

want of precision in the employment of language in different parts of the enactment, the fact that the proviso to the second section uses the terms "confirmed or granted," as if they imported the same meaning, and the consideration that if "confirmed" was used in an exclusive or technical sense, then the second proviso should have been a part of the second section, inclines us to think, that the proviso was intended as a limitation not only upon the second, but upon the third section also. See Public Lands, Ins. & Op., part 2d, (edit. 1838) No. 672, p. 717.

Let it be conceded however, that this construction of the act is indefensible, and we are of opinion that the report of the Register and Receiver and the third section do not invest the defendants with a legal title. Something more was necessary to consummate the grant to the persons under whom they claim. The land should have been surveyed as provided by the fourth section, and its location and quantity ascertained, that the certificate contemplated by the sixth, should be issued by the Register and Receiver. Unless its location was defined as directed by the act, the donation would be ineffectual, and could not operate as a grant—the indefiniteness of the object would prevent it; hence it was necessary to the vitality and efficacy of the bounty of Congress that the identity of the land to which it was intended to apply, should be particularized and distinguished. In Blake v. Doherty, 5 Wheat. Rep. 359, it was determined that the thing granted must be so described as to be capable of being distinguished from other things of the same kind; but the grant itself need not contain such a description as without the aid of extrinsic testimony, to ascertain precisely what is conveyed. So in Chinometh v. Haskell, 3 Pet. Rep. 96, it was decided that a grant must describe the land to be conveyed, and the subject granted must be identified by the description in the instrument. Where course and distance are the only guides, these, though unsafe, must be used. A Spanish grant was made for "six miles square of land" in Florida, "at the place called Dunn Lake, upon the river St. John," for the purpose of establishing machinery to be propelled by water: *Held*, that the description was too vague and indefinite for any survey to be made: that "actual manual possession has never been required to

give title, but such identity must be established as to enable the courts to ascertain with *reasonable* certainty where the land lies; as was held in Hanson's case, (15 Peters) and others. And this may be shown either from the face of the grant, or by a legal survey made by the surveyor general in conformity to the grant, during the time he had power to make such surveys." The U. States v. Lawton, et al, 5 How. Rep. 10. This decision was made with reference to the 8th article of the treaty of 1819, which provides, "that grants of land made by his Catholic Majesty, or by his lawful authorities, should be ratified and confirmed to the persons in possession of them to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty." See also citations by the plaintiffs in error.

As an additional reason why a location and survey should be made to entitle the claimant to a donation under the third section, the first proviso declares that not more than one tract shall be granted to any one person, that no tract shall contain more than six hundred and forty acres; and that no lands shall be thus granted which are claimed or recognised by the preceding sections, or by confirmation under a previous enactment. Unless the land is identified, how can it be known, what is its quantity, and whether it is not excepted from the influence of the act, so as to enable the Register and Receiver to issue a certificate to the claimant. From this view it results that the evidence of title exhibited by the defendants was not superior to that adduced by the plaintiffs. We will therefore inquire whether the ruling of the Circuit Court in the charge given, and in the charges refused, can be supported.

It may be regarded as a settled principle that a statute of limitations does not run against the State, unless it is expressly named. Ang. on Lim. 34, *et seq.*; The State v. Arlege, 2 Bailey's Rep. 401; Lindsey v. Miller, 6 Pet. Rep. 666; Weatherhead v. Bledsoe, 2 Tenn. Rep. 352; People v. Gilbert 18 Johns. Rep. 227; State Treasurer v. Weeks, 4 Verm. Rep. 215; Stoughton v. Baker, 4 Mass. Rep. 522; Nimmo v. Commonwealth, 4 Hen. & Munf. Rep. 57; Bayley v. Wallace, 6 Serg. & R. Rep. 245; Munshoner v. Patton, 10 Id. 334; Commonwealth v. Baldwin, 1 Watts' Rep. 54; Wallace v. Miner,

6 Ham. Rep. 366; Bledsoe v. Doe, 4 How. Rep. (Miss.) 13; Parmilee v. McNutt, 1 Smedes and M. Rep. 179; Parks v. The State, 7 (Miss.) Rep. 194; Harlock v. Jackson 3 Brev. Rep. 254; Wilson v. Hudson, 8 Yerg. Rep. 398; Wright v. Swan, 6 Port. Rep. 84. In Jackson v. Vail, 7 Wend. Rep. 125, a patent for a lot of land was granted in 1820, to a revolutionary officer, in pursuance of an act of the Legislature of that year; although the act declared that the patent should have like effect, as to the title to the lot, as if it had been issued in 1790, it was held that possession under a claim of title for thirty-five years, could not be set up as adverse, to bar the right to recover in an action of ejectment by the heirs of the patentee. The possession of the defendant previous to 1820, when the State divested itself of the title, could not be taken into the estimate under the plea of the statute of limitations; for it was only from that time the statute began to run. To the same effect, see Wilson v. Hudson, *supra;* Thomas v. Hatch, 3 Sumn. Rep. 170; Jourdan, et al, v. Barrett, et al, 4 Howard's Rep. U. S. 169.

To entitle a party to insist upon the statute of limitations his possession must have been notorious, uninterrupted, and under an adverse claim of title, for the period prescribed by the statute. Ang. on Limitations, 400, *et seq.;* Hapgood v. Hart, 4 Verm. Rep. 155; Martindale v. Troop, 3 Har. & McH. Rep. 244; Monroe v. Doe, 7 Ohio Rep. 262; Hawk v. Seuseman, 6 Serg. & R. Rep. 21; Plumer v. Brown, 8 Metc. Rep. 578; School District v. Blakeslee, 13 Cown. Rep. 227; Griffith v. Dickens, 2 B. Mun. Rep. 20; Moore v. Webb, Id. 282; Price v. Evans, 4 B. Munr. Rep. 386; Zeller v. Eckhart, 4 How. Rep. U. S. 289; Smoot v. Wathen 8 Miss. Rep. 524; Jackson v. French, 3 Wend. Rep. 337. Adverse possession is a question of fact for the determination of the jury under the usual instructions by the court. Hall v. Dewey 10 Verm. Rep. 593; Zeller v. Eckhart, *supra.*

To constitute prescription according to the law of Spain, by which rights were adjusted during the time his Catholic Majesty was in possession of Mobile, "good faith, just title, and capacity of the thing for the purpose, and of the person who prescribes, are necessary; as also continued or uninterrupted possession for a determinate time." By *good faith*, we are to

understand that the possessor believed that his right to the thing was valid at the time his possession commenced and so continues until the period of prescription elapses. "Just title consists in the cause or consideration by which possession of the thing is obtained, being one of those by reason of which dominion is acquired, as purchase, gift, inheritance, &c." 1 White's Recopilacion, 91 to 97, 346 to 349; 2 Id. 82 to 86, 736, *et seq.* Now, conceding that lands could be held by prescription against the King of Spain, and that the time necessary to bar a recovery had elapsed while his Catholic Majesty was in possession of the country within which the premises in question are situated, and still the possession of Durett is not shown to be such as will sustain a prescription. *Prima facie* it commenced by intrusion, and was defective in two essential elements, viz: *good faith* and a *just title.*

We are now brought to consider, whether the possession of the defendants and those under whom they claim, since the United States government was substituted for that of Spain, will sustain the plea of the statute of limitations. The defendants, it must be observed, do not rest their pretensions upon a grant or other evidence of title emanating from the Spanish authorities, which is valid *per se*, or which moral or political justice required the United States to recognize or confirm. It is expressly affirmed by the report of the Register and Receiver, that the original claimant and his representatives occupied merely as settlers, having no claim derived either from the French, British, or Spanish Governments. Admitting that their possession may have been adverse to the U. States, upon an assertion of exclusive title, (which however it seems is a question that should have been submitted to the jury instead of being decided by the court,) yet it is clear, that if the prescription was not complete when Spain ceded the territory by the treaty of Ildefonso, it did not continue to run against the United States, after it became the proprietor by the treaty of Paris. Foster & Elam v. Neilson, 2 Pet. Rep. 253; Garcia v. Lee, 12 Pet. Rep. 511, and citations above, to show that statutes of limitations do not apply to a State, unless it is specifically named.

The report of the Register and Receiver, and the act of Congress of 1822, we have seen do not *per se* invest the de-

fendants with a title to any specific tract of land, and that in the absence of evidence to show a location and survey, the act of Congress of 1832, confirming the title, under which the plaintiffs claim, and the patent, consequent thereupon, establish such a legal title as entitles the plaintiffs to recover.

It is however insisted that it must be intended from the length of time the possession under which the defendant claims, has been continued, that it commenced, or has been sanctioned by a grant under Spain. Conceding that his Catholic Majesty could be deprived of his domain by prescription, and it has been already shown that the facts do not establish the prescription according to the provisions of the Spanish law. The prescription being imperfect, it is difficult to perceive any ground upon which a grant can be presumed. Knowing, as we are bound to know, the modes in which the Spanish authorities disposed of the royal domain in Louisiana, we could not presume that the occupant had a perfect title; at most, it could only be intended that he was authorised to take the possession under a title either perfect or imperfect; the latter of which would be invalid, without the confirmation of Congress. But do not the facts repel the idea that Durett the original claimaint, derived any title from the local authorities of Spain. If he ever had any such evidence to sustain him, why did not his representatives vindicate their claim upon that ground before the Register and Receiver, instead of appealing to the mere bounty of the government?

We are aware that in a controversy between individuals in respect to land, a grant has been often presumed from uninterrupted possession for a time sufficiently long for the statute of limitations to operate a bar; but in a case where prescription will not avail, can such a presumption be indulged? There is not the slightest pretence for infering that the title relied on by the defendants ever received the sanction of the United States, otherwise than by a donation which we have seen does not appear to have become operative. The possession of the defendants being unsupported by documentary evidence of a title, or by prescription, there is nothing shown to bar the plaintiff's right to recover. See Callender v. Sherman, 5 Ired. Rep. 711.

We have seen that the statute of limitations did not begin

to run previous to 1832, when the title under which the plaintiffs' claim was confirmed, and the bar was not completed previous to the institution of the present suit. The ruling of the Circuit Court cannot therefoere be sustained—its judgment is consequently reversed, and the cause remanded.

Dargan, J., not sitting.

LEACH & WIFE *vs.* WEST et als.

1. A bailee of slaves, who recognises the title of the owners, *two of whom are infants*, and, acting in good faith, keeps them subject to delivery whenever legally demanded, but who, in consequence of instructions from the guardian of the infants, refuses to deliver them to the other joint owners, without his authority, is not chargeable in equity with what the slaves would have hired for, but only with the actual value of their services, after deducting the expenses of their food and clothing.
2. Where a father by deed conveys a life estate in slaves to his son, with remainder to his brothers and sisters should he die without children, and the son afterwards exchanges one of the slaves with his father for another, refusing at the same time to receive the slave exchanged for subject to the limitations of the deed, but requiring therefor an absolute deed from his father with covenant of warranty, the slave so exchanged for cannot be considered as substituted for the one embraced in the former deed.

Error to the Chancery Court of Dallas. Before the Hon. W. W. Mason, chancellor.

The bill, which was filed by defendants against plaintiffs in error, two of whom are infants, to recover certain slaves and to have an account of their hire, &c., alleges that Jonathan Brantly, the father of the complainants, on the 12th Sept. 1834, conveyed by deed to James B. Brantly, another child, certain slaves, for and during the term of his natural life, and at his death, having no child or children then living, to his brothers and sisters, or their descendants: that James B. Brantly took

possession of the slaves under and by virtue of the deed, and subject to its conditions and limitations: that the said James B. is now dead, and at the time of his death was in possession of all the slaves named in the deed, except one by the name of Watt, which the said James B. in his life-time had exchanged with his father for one by the name of Carey, by which exchange Carey was substituted for and put in the stead of Watt, and held subject to the conditions of the deed: that the said James B. left a widow, Elizabeth B., since married to her co-defendant Leach, but no child or children, and that since the death of the said James B., all the slaves embraced by the deed, together with the slave Carey, have been in possession of the said Elizabeth B. and said Leach, who, though the said Elizabeth admitted complainants' right to them, refuse to deliver them to complainants, &c. The two infant defendants are children of a deceased son of Jonathan Brantly. The answer of Mrs. Leach denies that Carey was ever held subject to the conditions of the deed, and avers that he was conveyed by Jonathan to James B. Brantly by a separate and absolute deed with covenant of warranty, and that at the time of the transaction and before its consummation the said James B. positively refused to receive Carey and hold him in any other way than as his absolute property, free from any condition or limitation. It also denies that the defendants have ever refused to deliver up the balance of the slaves on such demand as could be safely complied with, and avers that they have always been ready to deliver them, whenever they could legally do so; that she had been advised by counsel, that as some of the parties entitled to them were minors, it would not be safe to deliver them to any one of them, without such one was legally authorised to receive them: that the regularly appointed guardian of the minors had notified her not to give them up: and that under these circumstances, acting in good faith, and not only willing but anxious to deliver up the slaves, she was compelled to decline their delivery to one of the complainants, who demanded them, but who exhibited no authority from the others to do so. The answer further denies that, under the facts and circumstances, keeping the slaves, as was ever the case, subject to delivery at any time on such demand as could be safely complied with, the defend-

ants are liable for the hire of the slaves. The proofs are sufficiently referred to in the opinion of the court.

The chancellor on the final hearing decreed, that the defendants deliver up Carey, the others having been previously delivered to the master under a decretal order, and account for his hire as well as that of the other slaves. The defendants thereupon appealed, and now assign this decree as error.

LAPSLEY, for plaintiffs in error:

There is error in two matters—1st. In charging the defendants below with hire. The testimony shows, as the answer avers, that Mrs. Brantly (the widow of James B., now the wife of Leach) was not only willing and ready at all times, but that she was most anxious to deliver up the slaves, whenever she could do so with safety, and that she kept them most unwillingly: that she acted from first to last in this matter under the advice of counsel.

2. There was error in decreeing against the defendant below, for the slave Carey. How can it be contended that Carey was subject to the original deed of gift? He was acquired long after, without any reference to the deed, and a separate and absolute title taken for him. The answer denies that he was received subject to the deed in any way; and the terms of the bill of sale taken for him, the money consideration expressed, the absolute warranty of title to the vendee *and his heirs*—these facts show most conclusively, that it was not intended by either party that Carey should be held subject to the deed. The fact that Carey was obtained from the donor, and in exchange for a negro originally given by the deed, is of no consequence. James B. Brantly had the right to set what price he pleased on his life estate in Watt: the price he set was an absolute and unconditional title to Carey. If the father was willing to give Carey absolutely, as he did, for the life estate in Watt, why might it not be done? Who had the right to object?

EVANS, for defendants:

1. There are but two assignments of error—one impeaching the decree, because hire for the slaves is decreed against the defendant; the other, because the decree adjudges the

slave Carey to be subject to the equitable claim of the complainants and the infant defendants. In respect to the hire, we insist, that even if it were true that the defendant Elizabeth could not safely surrender the slaves at an earlier day, still if the services of the slaves have been beneficial to her, she is bound in equity to account to us to the extent of those services. Whatever the slaves have earned since the institution of the suit, belongs in equity to those who have the title, and it would be manifestly unconscionable to allow the defendant Elizabeth to retain, or deprive the complainants and infant defendants of these earnings. The evidence shows, that the slaves were worked upon the plantation of the defendant Elizabeth from the institution of the suit until given up, (twelve months,) and the defendant has furnished no criterion for the ascertainment of the value of their wages, and consequently we are compelled to resort to the value of the hire as the nearest approximation to the actual benefits which the defendant received from the services of the slaves. It is evident, however, from the whole record, that the defendant Elizabeth B. did not wish to surrender them earlier; she kept them from January to January—just sufficient time to make and gather with them one crop; she then found no difficulty in surrendering them to the register. This might have been done as well earlier—there was nothing to prevent. It does not appear that at any other time, or on any other occasion, she made any effort to surrender the slaves, either to the court or to the parties.

2. Why may she not be required to surrender the slave Carey? It is clear from the evidence, that the transaction was a simple substitution of one slave for the other. It is not denied but Watt would be subject, if in defendant's possession, to our claim; and why may not Carey be equally subject, when he is but placed in the *stead* of Watt? The pretence that the life estate in Watt was sold, and an absolute estate in Carey purchased, is totally unsupported by the proof. Besides, if James B. Brantly sold the slave Watt, so as to place out of reach of complainants, his estate, of which Elizabeth B. is executrix, will be chargeable in equity.

CHILTON, J.—This bill was filed by the defendants in error against the plaintiffs, to recover certain negro slaves and

to have an account for their hire, as also to discover the title deed under which they held said slaves, and to have a partition of the property between the complainants below and two infant defendants, who are incompetent to consent to a division.

There seems to have been no controversy in the court below as to the right of the complainants to recover the slaves, except as to the slave Carey, which the bill charges was substituted by an agreement between Jonathan and James B. Brantly in lieu of Watt, one of the slaves conveyed by the deed; but which allegation is denied in the answer of Mrs. Leach. The answer also denied that Mrs. Leach was liable to pay hire for the slaves. The chancellor decided against the plaintiffs in error upon both grounds.

The assignment of errors presents two questions for our consideration: 1st. Whether the chancellor properly charged the plaintiffs in error with hire for the slaves, while they were in Mrs. Leach's possession. 2d. Whether any decree should have been rendered against them for the boy Carey.

1. Many witnesses were examined as to the value of the slaves, and the willingness of the plaintiffs in error to surrender them. Without setting out the proof, which we have carefully examined, it is sufficient to observe that it very clearly shows, the plaintiffs in error set up no claim to the slaves sued for, except the boy Carey: That Mrs. Leach was willing and even anxious to deliver them to the true owners, upon their executing to her the indemnity which she was advised to demand, against the claim of two minors, who were jointly interested in the property with the complainants, and whose guardian forbade her to surrender them. This indemnity was promised, but never properly tendered. The proof further shows, that she retained the slaves under the advice of counsel, in good faith, and held herself ready at any time to deliver them to the true owners, when she should be justified in doing so. Under such circumstances, we think she should not be held responsible for what the slaves could have been hired for to others. It was uncertain when she would be required to turn them over, either to the court or to the complainants. She could not therefore hire them out for a specified time, lest she should not be able to control them, so as to make the delivery when demanded. Neither could she adjust her farming ope-

rations, so as to render them profitable to her, on account of the uncertainty as to the time she should retain them. But as the proof shows that they rendered her some service, it is proper that she should be charged with the value of whatever service they performed, taking into the estimate the situation in which she was placed in regard to them. The master should have been instructed to inquire and report whether any and what benefit accrued to her from the employment of said slaves, while they were in her possession, and the extent and value of such service, beyond the expense of feeding and clothing them. If any, she should be charged with that sum. Regarding her in the character of bailee or trustee for the owners of the slaves, and having acted in good faith, equity will protect her, and while she shall not make a profit to herself from the employment of the slaves, but for the owners, she must not, on the other hand, be subjected to loss. Greene v. Winter, 1 Johns. C. Rep. 40; McKinley v. Irvine, 13 Ala. 181–705; Hill on Trustees, 534.

2. In respect to the slave Cary, we have no hesitation in pronouncing the decree erroneous. Waiving the consideration of the question, whether this deed from Jonathan to James B. Brantly did not create a contingent remainder in the complainants, subject to be destroyed by a sale on the part of James B., the person entitled to the life estate, we are very sure, the proof does not sustain the allegations of the bill in respect to the exchange and substitution by the donor and donee of Carey for the boy Watt. So far from this being true, the proof shows that James refused to make the contract, until Jonathan would give him a bill of sale to Carey, vesting in him the entire title. Jonathan, the donor, of course knew the interest which his son had in the slave Watt, as he held under his deed, and that he could purchase no greater interest than his son could sell. This interest he had a perfect right to acquire, and to give in exchange for it the slave now in controversy. The bill of sale which was executed by Jonathan to James B., conveying an absolute title to the latter in Carey, with covenant of warranty, as to title against the grantor, &c., very clearly shows, especially when taken in connection with the other proof, that Carey was to be held as the absolute property of James, and not subject to the limitations

expressed in the deed. It is then too clear to admit of any doubt, that James having an interest in Watt which he could sell, and did sell or exchange for this slave, held him discharged from any claim of complainant's, either vested or contingent. We will not undertake now to decide whether the donor could defeat the remainder by a purchase of a greater interest than the life estate from the donee, as it is not necessary to a decision of this case, and will more properly arise should the remainder men seek to recover the slave from the donor. Upon the proof in this case, it is very clear, the complainants should not have a decree for Carey.

Let the decree be reversed, and the cause remanded for further proceedings conformable to the views above expressed.

SAVAGE, GUARDIAN, &c. *vs.* DICKSON.

1. A guardian is bound to use ordinary prudence and diligence in managing the estate of his ward, and if he brings suits in the ward's name, where no cause of action exists, he is personally chargeable with the costs, although he may have acted under the advice of counsel.
2. A guardian should ascertain the facts of the case, before he brings suit for his ward, and if he *heedlessly* sues on a supposed state of facts, which in truth does not exist, he is personally liable for the costs incurred.
3. The Orphans' Court, except in cases of contested wills and insolvent estates, has no authority to summon a jury, unless it becomes necessary, in the progress of a cause, to ascertain the truth as to some disputed question of fact, in reference to which the testimony is so conflicting that the court is left in doubt as to what should be its decision.

Error to the Orphans' Court of Clarke.

THIS was a proceeding by the plaintiff in error as guardian of the minor children of Robert White, deceased, against the defendant in error, as a former guardian, to compel a final settlement of his accounts. The accounts of the defendant in error were contested, and the court summoned a jury to try the issue. The remaining facts appear in the opinion. The

jury rendered a verdict in favor of defendant in error, and the court decreed accordingly. The matters of the decree and the submission of the questions at issue to a jury, are the errors now assigned.

VARY, for plaintiff in error made the following points:

1. A guardian cannot charge his ward with any expenses he may chose to pay, but before he can be allowed the benefit of money thus expended, it must appear that the expenses were reasonable and proper. The general rule is, that acts done by the guardian without authority, will not bind the ward, unless beneficial to him. Alexander v. Alexander, 5 Ala. 517.

2. The court had no authority to summon a jury. Clay's Dig. 229, § 42. It was never intended by our statutes, that the responsibility should be shifted from the court upon the jury. Willis' adm'r v. The heirs of Willis, 9 Ala. 333; Reynolds' adm'r v. Reynolds' distributees, 11 Ala. 1027.

COOPER, contra.

DARGAN, J.—This was a proceeding in the Orphans' Court of Clarke, for final settlement of the accounts of John Dickson, former guardian of Thomas White, a minor. It appeared that Dickson, who was the guardian of Thomas and William White, minor sons of Robert White deceased, commenced three suits in detinue to recover certain slaves in the name of his two wards, which suits were dismissed, and then he filed a bill in equity to reform a certain deed, under which he supposed his wards had title to the slaves. On the hearing, the bill was dismissed. The costs of these suits and counsel fees he charged to the account of his wards—one half to each. These charges were objected to, but allowed by the court.

It is certainly the duty of a guardian not only to defend, but also to bring such suits as are necessary for the protection of the rights and interests of his ward. If the guardian have a just pretence, or reasonable ground for bringing the suit, the costs must be borne by the minor, unless the guardian has conducted himself improperly in the management of the suit and thereby swelled the amount of costs to an unreasonable extent—Alexander v. Alexander, 5 Ala. 517. But it is equally

clear that if a guardian or other trustee, commence suits without a possibility of recovering, or any pretence of right whatever, he ought not to be permitted to charge his ward or cestui que trust with the expenses of the suit; for as a suit was commenced by the improper conduct of the guardian, he must bear the loss incured by his own improper acts. These may be said to be the general rules on the subject, and guided by them, we must determine each and every case upon its own peculiar circumstances.

The supposed right of the infant wards in this case arises from a deed executed by their father to their mother, just before their intermarriage, by which he conveyed to her a negro woman, (the mother of the slaves that were sued for.) The language of the deed is as follows: "Know all men by these presents, that I, Robert White, for and in consideration of the love and affection I bear for Sarah Dickson, (my intended wife) give, grant, and confirm to her a negro woman named Phillis, and to the lawful issue of the marriage to be begotten: It is furthermore understood and agreed, that in case there shall be no issue of the marriage, then the said negro shall, at the death of her the said Sarah Dickson, return to the said Robert White or to his heirs." The father Robert White was dead, but the mother was in life, at the commencement of the suits. The suits however, were commenced after advising with counsel, but were subsequently dismissed. No one acquainted with the first maxims of law, would have advised the bringing of these suits, for it is manifest, that as the deed was their only foundation of title, the suits could not be sustained. The guardian then commenced suits under the advise of counsel it is true, but on a statement of facts, on which no one acquainted with the first principles of law, would have advised the bringing of them. Who shall bear the costs and expenses? A guardian is bound to use due and proper diligence and skill in the managemeut of the estate of his ward, but if he advises with counsel, who from inexperience or any other cause is incapable of giving good counsel on questions governed by the plainest principles of law, and acts under the advise of such counsel to the injury of the estate, who shall bear the loss? I think it should be borne by the guardian, and not by the ward, who is incapable of acting for himself.

In the employment of counsel, as well as in any other acts, he should be bound to reasonable prudence and diligence, and if he intrusts the management of the estate of his ward to counsel incapable of advising correctly in reference to plain questions of law, he and not the ward must bear the injury that may result from it. I see that it is difficult if not impracticable to lay down a general rule, that will guide us in all cases, in determining whether the guardian and not the ward shall bear the expenses of fruitless litigation, commenced under the advice of counsel. The rule would be more uniform and easy of application, to hold, that the advice of counsel should in all cases protect the guardian from the payment of the costs incurred; but to hold that a guardian may commence suit in the name of his ward, without pretence of title, if any counsel however inexperienced shall advise it, would in many cases relieve the guardian from the consequences of his own improper conduct, and throw the burthen of the cost on the ward, although the guardian had not observed ordinary prudence and diligence, and thus the minor would be made to bear the loss resulting from the imprudence and neglect of his guardian. The suits at law were so utterly destitute of foundation, that we think they were not commenced with proper prudence and caution, and the *guardian must bear the loss.*

2. The evidence taken in the chancery suit is not before us, and we can look only to the recitals in the decree of the chancellor, to form an idea of it. His decree shows that there was no evidence, that it was the intention to give the children of the marriage any right or benefit under the deed, and if there was a mistake, or if it was unskilfully drawn and did not express the meaning of the donor, the mistake was prejudicial alone to the mother, and not to the children. A guardian should ascertain the facts of the case before he brings suit. If he heedlessly sues, on a supposed state of facts, without knowing whether he can prove them by any one witness, he must bear the loss. If, however, he brings suit in good faith on a supposed state of facts, and these facts are testified to by one or more witnesses, but other testimony is introduced, which overbances the evidence offered by the guardian, or other facts are established, that negative the right ot his ward to recover,

then, the guardian should not be charged with the expenses of the suit—Alexander v. Alexander, 5 Ala. 517. It does not appear that a particle of testimony in support of the right or interest of the wards was introduced; we cannot, therefore, charge the minors with the costs, for the guardian was guilty of neglect in commencing suit, without knowing that he could introduce some proof in support of the title of his ward, and he should not be allowed to visit the consequences of his own neglect on his ward.

3. The Orphans' Court, in the exercise of its jurisdiction in reference to estates of decedents, has the power to summon a jury in cases of contested wills; also, by the act of 1843, in cases of insolvent estates. In all other cases, it is the duty of the court to determine the facts and decide the cause, without the intervention of a jury, unless in the progress of the trial it becomes necessary to ascertain some particular fact, or facts, and the testimony in relation to those facts is so conflicting as to create doubts tn the mind of the court how they should be decided. In such a case, the court may impannel a jury to determine such facts. Willis' Adm'r. v. Willis' Distributees, 9 Ala. 333; 11 Ala. 1027. In such a case, however, the jury is impannelled to try and ascertain the facts only, in the same manner as an issue out of the Court of Chancery is tried, and by their verdict they inform the court of the truth of the particular fact or facts submitted to their determination. But before the court should impannel a jury to try any fact, except in the cases of contested wills and insolvent estates, it should appear that it was necessary to ascertain those facts, and that the testimony rendered it doubtful how they should be determined. In the case at bar, it does not appear from the record that it was necessary to ascertain any fact by the verdict of a jury, for no fact is rendered doubtful from the evidence, nor does it appear that any particular fact was submitted to the jury. It was therefore unnecessary to impannel a jury, and their verdict, which seems to have been rendered on the merits of the whole cause, cannot establish the right of the guardian in opposition to the law and the evidence submitted to the court. It was the duty of the court to determine the whole question on the evidence submitted, and it cannot shift this responsibility from itself upon a jury. When a jury is impannelled to

try a doubtful fact, they act in aid of the court. They inform the court by their verdict of the truth of the particular facts submitted for their determination, and which are necessary to be ascertained in the progress of the cause. We do not see that there was any necessity for impannelling a jury in this case. If, however, the Orphans' Court should improperly impannel a jury to try the whole case, or any particular fact, but the final decree should be in accordance with the law and the right of the case, it could not be reversed because a jury was unnecessarily impannelled.

We think the Orphans' Court erred in allowing the guardian his costs in the suits commenced by him in the name of his ward, and the decree must therefore be reversed, and the cause remanded.

HERNDON *vs.* GIVENS.

1. A count in a declaration against a bankrupt on a pre-existing liability as the endorser of a promissory note, upon which he had been charged by regular proceedings against the makers, which, after stating that the makers on bill filed, &c. obtained an order enjoining the parties—that on the final hearing said injunction was by decree of the Chancellor made perpetual—and that from this decree an appeal was taken to the Supreme Court, *avers*, "that after the discharge of said defendant in bankruptcy, and whilst the said appeal was pending in the Supreme Court, the said defendant undertook and faithfully promised the plaintiff, that if plaintiff should lose said case in the Supreme Court, he would make it good to him, and plaintiff should lose nothing by said endorsement of the note—and that the said decree of the Chancellor was subsequently by said Supreme Court in all things affirmed," sets out a sufficient consideration to support a subsequent promise.
2. The statute of 1807, which enacts that "no freeholder of this State shall be sued out of the county of his permanent residence," does not apply to suits commenced by attachment.
3. Upon notice to the plaintiff, under the *eighth rule* for the regulation of "practice in the Circuit and County Courts," to produce the writing sued on, the sufficiency of the excuse for its non-production is addressed to the discretion of the primary court, and its decision is conclusive.
4. Where in an action against the endorser of a promissory note, the plaintiff swears that he delivered the note to an attorney for collection

and has not seen it since, though he has made diligent search for it, and proves by the Clerk of the Court in which suit was instituted against the makers, that judgment was rendered at a particular term, and that all the papers in the cause had been abstracted from his office, a sufficient predicate is laid for the introduction of secondary evidence.

5. Where a principal places in the hands of his surety the note of a third person as an indemnity against his liability, and the surety, after suing the note to judgment, without the consent of the principal, settles said judgment by taking from the defendant therein the note of another person, endorsed by him, the principal is a competent witness for the surety in a suit against the said defendant as endorser of the note so assigned by him in discharge of said judgment.
6. In the examination of a witness on *voir dire*, it is permissible for him to testify as to the contents of written instruments that are not produced.
7. Where a record is introduced by a party to prove a particular fact, the opposite party is not entitled to avail himself of it as proof of other facts, for which he could not have used it as primary evidence.
8. A deposition, taken after the day on which the commission is returnable, is properly excluded from the jury.
9. Where a record is composed of several distinct papers, they should be attached, that the court may be enabled to see that the clerk's certificate applies to all of them. But if this is not done, would it not be competent to establish the genuineness and authenticity of the transcript by showing that it is a sworn or examined copy?—QUERE?

Error to the Circuit Court of Talladega. Tried before the Hon. Nathan Cook.

THIS was a suit commenced in the Circuit Court of Talladega by attachment sued out at the instance of the defendant against the plaintiff in error, to recover the amount due on a promissory note, executed by John and William Tidmore to Herndon and Kelly, and endorsed and delivered by the plaintiff to the defendant in error. A plea in abatement is found in the record, but nothing to indicate what disposition was made of it. The declaration contains seven counts, and the defendant below demurred to the second and sixth. The second, after setting out the note and endorsement, the recovery of judgment against the makers, the return of no property on the first execution issued, and a levy of one subsequently sued out on certain real estate as the property of said John Tidmore, and the discharge of the defendant in bankruptcy, avers, "that afterwards the said John Tidmore, by his bill of com-

plaint filed, &c. against said Herndon and Kelly, and James A. Givens (the plaintiff,) obtained an order, &c. enjoining the said parties from proceeding to execute said writ of *fieri facias* against him;" that on the hearing, said injunction was by decree of the chancellor, made perpetual; that from this decree an appeal was taken to the Supreme Court; that after the discharge of said defendant in bankruptcy, and whilst the said appeal was pending in the Supreme Court, the said defendant undertook and faithfully promised the plaintiff, that if plaintiff should lose said case in the Supreme Court, he would make it good to him, and plaintiff should lose nothing by the endorsement of the note; and the said decree of the chancellor was subsequently by said Supreme Court in all things affirmed, &c. The sixth count alleges, that on the — day of July 1842, at a term of the County Court of Benton, held on the second Monday of said month, the said Edward Herndon and William C. Kelly for the use of the plaintiff recovered a judgment against John and William Tidmore for $1438, their debt, &c., "and said plaintiff says, that said judgment was rendered on a note, purporting to have been made by said John and William Tidmore before that time, and transferred to plaintiff by the said Herndon and Kelly for a valuable consideration." The remaining averments of this count are substantially the same as those of the second count. To each of these counts the defendant demurred, but the court overruled his demurrers. He then, after proving notice at the appearance term to the plaintiff under the rule to produce the note described in the several counts of the declaration, and that it had not been done, moved the court for a nonsuit. The plaintiff, in answer to the motion, swore that he employed William H. Estill, Esq. of Benton county, in January 1842, to collect the note, and delivered it to him for that purpose, since which time he had not seen it, although he had made diligent search for it, and proved by the clerk of the County Court of Benton, that judgment on the note was rendered in said court at its July term 1842, in favor of Herndon and Kelly for the use of the plaintiff, that he had not seen the note since that time, and that all the papers in the case had been abstracted from his office before this suit was commenced. The court thereupon denied the motion of the defendant. The proof adduced by

plaintiff on the motion for a nonsuit, was also offered on the trial, to show the loss of the note, in order to let in secondary evidence, to the sufficiency of which the defendant objected, but the court overruled the objection, and allowed the contents of the note to be proven. The plaintiff introduced as a witness his son, James A. H. Givens. The defendant objected to his competency on the ground both of interest and public policy, and in support of the objection caused him to be sworn on his *voir dire*, whereupon he stated that he and his brother Edward A. Givens, being partners in trade in 1839, sold goods to the defendant to the amount of about $4000, for which they took his note; that at that time the plaintiff was bound as security for them in bank to about the same amount; that they transferred to plaintiff the note of the defendant as collateral security against his said bank liability; that plaintiff sued defendant and recovered judgment against him on said note in July 1841; that some time afterwards he, believing that he could make the money on said judgment, applied to plaintiff for the control of it, which application plaintiff refused, and told him that he should never look to him to pay any of said bank indebtedness: that the defendant afterwards satisfied said judgment by paying a part of it in money and transferring the note sued on, with other notes, to the plaintiff; that this arrangement between the plaintiff and defendant had never been ratified by the witness, but on the contrary was opposed by him at the time; that the plaintiff has paid nearly all the bank debt; and that the witness has not, and never had any interest in the note sued on, or in the event of this suit. The court overruled the objection to the competency of the witness, and permitted him to testify. The plaintiff also introduced as a witness, Edward A. Givens, who, being examined on *voir dire* as to his interest, stated substantially what was stated by Jas. A. H. Givens, with some additional facts, which are noticed in the opinion of the court. In the course of this preliminary examination, the witness stated in answer to a question propounded to him by the defendant's counsel, that he had executed two deeds of trust to the plaintiff since the institution of this suit. He was then asked to state the consideration of these deeds, but the plaintiff's counsel objected to his answering, because the deeds were not produced, nor notice given

to produce them, and the court sustained the objection and excluded the answer. The plaintiff offered in evidence the transcript of the chancery proceedings in the case referred to in the second and sixth counts of the declaration, so far only as to show that a final decree was therein rendered against the plaintiff and defendant; the defendant objected, but the court overruled the objection and suffered it to go to the jury. The plaintiff also offered to read in evidence the deposition of William Johnson, to which the defendant's counsel objected, because of the alleged insufficiency of the affidavit, and because the deposition was taken on the second day of the term of the court to which the commission was made returnable. The court overruled both objections, and the deposition was read. The plaintiff further produced as evidence a transcript of the judgment in favor of Herndon and Kelly, for the use of the plaintiff, against John and William Tidmore, and in connection therewith offered to read a copy of the execution issued thereon, which was partly printed and partly written, the written part being in the hand-writing of the clerk, and which bore the endorsement by the sheriff of no property. This copy execution was not attached to the transcript of the judgment, but was forwarded in the same envelope with it. The defendant objected to the copy execution being read to the jury, because it was not properly certified, but the court overruled the objection and allowed the evidence. The defendant offered to introduce as evidence the entire chancery proceedings, with every matter and thing therein contained, but the plaintiff objected and the court sustained him. Numerous charges were asked and refused, and others given; but as the opinion of the court does not embrace any question raised by them, it is unnecessary to set them out. To the various rulings of the court, the defendant excepted, and now assigns them severally as error.

Rice & Morgan, for plaintiff in error:

1. The defectiveness of the 2d and 6th counts, as well as of the other counts, will become manifest by reading them in connection with the points decided in the following cases: Posey v. Hair, 12 Ala. 567; Main v. Town of Preston, 18 Conn. 220; 7 Porter, 9; Moore v. Coker, 2 ib. 347; 6 Ala. 171.

2. The court below should have ordered a nonsuit, under the 8th Rule of Practice. Bell & Crouch v. Moore, 9 Ala. 823.

3. The evidence of the loss of note and endorsement was not sufficient to authorise proof of contents, by secondary evidence. Judson v. Eslava, Minor's R. 71; Willis v. McDoule, 2 South. 501.

4. James A. H. and Edward A. Givens were incompetent witnesses for the plaintiff below. Prewitt v. Houston, 8 Ala. 846; Foster v. Nolin, 4 Missouri, 18; Carter v. Graves, 6 How. (Miss.) Rep. 9; R. R. Road v. Johnson, 7 Watts & Ser. 317.

5. Inasmuch as the proceedings of the Benton Chancery Court had been read in evidence by plaintiff below, the defendant had a right to use the matters therein shown as evidence against the plaintiff. Sowerwine v. Jones, 7 Gill & J. 335.

6. On *voir dire* examinations, it is not necessary to produce writings; their contents may be proved by parol. Phil. Ev. C. & H. Notes, 260, 709, 1557.

7. The deposition of Johnson was a nullity, because it was taken after the time fixed in the commission for taking it had expired. Ulmer v. Austill, 9 Porter, 157; Kirk v. Suttle, 6 Ala. 679; 8 Verm. 404.

8. The printed *fi. fa.* admitted in evidence was not authenticated in any legal manner, nor was it shown to be an examined or sworn copy.

9. The loss of the note and endorsement, prior to the commencement of the suit, is a bar to this action, unless it is proved that before the suit was commenced, the plaintiff made the affidavit required by the statute of 1828, in relation to suits on lost instruments. Posey & Coffee v. Br. Bank at Decatur, 12 Ala. 802.

L. E. Parsons, for defendant.

COLLIER, C. J.—We think the demurrer to the declaration was rightfully overruled. Each count distinctly alleges a promise to pay the indebtedness stated, and the consideration set out in them is altogether sufficient to sustain the promise. This conclusion is so obvious from the mere reading of the declaration, that we do not deem it necessary to give to the counts a more special notice.

2. The act of 1807 enacts, that "no freeholder of this State shall be sued out of the county of his permanent residence, provided the same be within this State, unless it be in the actions enumerated in the last section; nor shall any person, who may reside in this State, be held to bail, if sued out of the district or county of his residence and freehold." Clay's Dig. 342, § 163. This enactment does not apply to suits commenced by attachment, but only to those instituted in the ordinary mode of process against the person of the defendant. The attachment is an extraordinary remedy, justified by the exigency of the case, and supposes that the seizure of the defendant's property by the initiatory process is most probably essential to the recovery of the plaintiff's demand. If the creditor was always compelled to sue it out in the county in which the debtor may be a "freeholder" and have a "permanent residence," it would sometimes be ineffectual, and the debt might be lost. Thus, where the freehold was of much less value than the amount of the debt, or was encumbered, and the creditor might meet the debtor in another county removing all his personal estate beyond the limits of the State: if the creditor in such case were required to sue his attachment in the county of the debtor's residence, before it could be levied, the latter might transfer his property to another jurisdiction. We cannot think the Legislature ever contemplated a restriction of the remedy by the act cited. This conclusion is indicated not only by the liberal extension of the attachment law, but also by the terms of the act, which seem to refer to process against the defendant himself, and not against his estate. If the latter was intended to be embraced, why inhibit the requisition of bail, which appropriately applies where the defendant's person has been arrested? Where property is seized under an attachment against a resident debtor, is the defendant entitled to have his property restored, unless he first executes a replevy bond conditioned for its "forthcoming and delivery to the proper officer," to satisfy the judgment that may be rendered against him? See Clay's Dig. 57, § 11; 61, § 33. We content ourselves with this reference to the statutes, without stopping to answer these questions—having already said more than is necessary, as the plea in abatement appears from the transcript before us to have been superseded by the pleas in bar.

3. It is provided by the eighth rule for the regulation of "practice in the Circuit and County Courts," that "when the action is on any instrument purporting to have been signed by the defendant, and within the time prescribed for pleading, he shall give notice to produce it, it shall within one day thereafter be produced for his inspection. In default thereof, a nonsuit may be entered, unless excuse be shown." Clay's Dig. 610. It is perfectly clear, that the sufficiency of the excuse for the non-production of the writing must be determined by the court in which the requisition shall be made. The excuse is addressed to the sound discretion of that court, and according to all analogy its decision must be conclusive and uncontrollable by the appellate tribunal.

4. We think the preliminary proof of the loss of the note was sufficient to let in secondary evidence of its contents.—The plaintiff stated that he delivered it to W. H. Estill, an attorney at law, for collection, in January 1842, and had not seen it since, although he had made diligent search for it. The clerk of the County Court of Benton testifies that a judgment was recovered in his court in July 1842, on the note against the Tidmores; that he had not seen it since that time; and that it was lost or mislaid before the present action was instituted. It was also shown that none of the papers connected with the suit against the Tidmores were in the files of the County Court. Whenever a judgment is rendered in an action founded upon a note or other writing, the usual and correct practice is to file the writing with the papers in the cause, there to remain, unless the court shall make an order for its withdrawal, which order is always readily granted where it is necessary to the prosecution or defence of a party's rights. It must be presumed in the absence of opposing proof, that the note was left by Mr. Estill with the papers; and there being no evidence to show its withdrawal, the fair inference is, that it has been lost or mislaid.

5. J. A. H. Givens had no such interest in the result of this suit as disqualified him as a witness. Though he may with his co-partner have been the primary debtor, and the plaintiff their endorser, yet when the plaintiff accepted of the defendant some money and other securities in payment of the judgment he recovered against the defendant, upon the note which J. A.

H. Givens & Co. transferred to him as collateral security for his endorsement, he adopted the note and judgment as his own and discharged the Messrs. Givens from all obligation to reimburse him his payments to the bank. Cocke v. Chaney, adm'r, 14 Ala. 65. The fact that the witness may still have continued a debtor to the bank can make no difference; for he would still be chargeable with that indebtedness, whether the plaintiff succeeds in the present suit or not; his liability cannot be affected by the success of the plaintiff; and even if the plaintiff fails to recover, he is bound to save the witness harmless. The witness then has no interest which the law will recognise, and the objection went to his credit.

6. The objections to the competency of J. A. H. Givens were also made to the examination of E. A. Givens. In addition, the latter stated that the plaintiff, his father, about six months previous to the institution of this suit, gave him one of the notes he had received from the defendant, in settling the judgment against him, which note the defendant had paid witness: *Further*, the witness was a member of the firm of J. A. H. Givens & Co., and if the plaintiff should fail in this action, he should feel "honorably bound to pay him." All this discovers no disqualifying interest. But while the examination was progressing on the *voir dire*, the defendant asked the witness if he had not executed two deeds of trust to the plaintiff since the present action, which being answered in the affirmative, he then asked the witness to state the consideration of the deeds. This latter inquiry was objected to, because the deeds were not produced, nor notice given to produce them, and the objection was sustained. In refusing to permit the question to be answered, we think the Circuit Court erred. It has been so often decided as to have become a settled principle, that a wttness may be examined on his *voir dire* as to the contents of writings not produced. 2 Phil. Ev., C. & H. notes, 260, 709-10: 3 ib. 1557. The question being adjudged inadmissible, without requiring the defendant to state what particular facts he proposed to elicit, it must be understood, that the decision was rested on the ground that parol evidence of the contents of the deeds was inadmissible under the circumstances, and it will be intended that he may have been prejudiced. Duffee v. Pennington, use, &c., 1 Ala. 506.

7. The record of the cause in chancery, at the suit of one of the Tidmores to enjoin the judgment at law against him, was clearly admissible for the purpose of showing a final decree had been rendered adverse to the plaintiff. One (at least) of the counts of the declaration alleged a promise to pay the plaintiff, if that judgment should prove unavailing; and to the extent for which it was offered the record was altogether pertinent. The defendant might show that it did not establish the facts assumed; but the plaintiffs having used the record for a legitimate purpose, did not entitle the defendant to avail himself of it, as proof of facts of which it would not have been primary evidence for him.

8. The affidavit that W. Johnson is "a material witness," and "by reason of bodily infirmity is incapable of attending to give his testimony in court," is a sufficient compliance with the statute to have authorised a commission to issue to take his deposition. Clay's Dig. 164, § 1. But the objection that the deposition was not taken until the day after the commission, according to its terms, was returnable, must be sustained. See Ulmer v. Austill, 9 Port. 157. The commission was the warrant to the parties to whom it was addressed to take the deposition of the witness; the authority it confered had expired previous to its execution; and therefore the deposition, the regularity of which depended upon the vitality of the commission, was properly excluded.

9. When a record is proved by the certificate of the clerk of the court, who is its proper custodian, that it "is a true and perfect transcript, &c." If it is composed of several distinct papers, they should be attached, that the court may see that the certificate applies to all of them, or perhaps the certificate will not be sufficient to impart verity to all the detached papers. But perhaps it would be competent to establish the genuineness and authenticity of the transcript by showing that it was a sworn or examined copy. These remarks will be sufficient to indicate the proper mode of authenticating the judgment and execution in the suit at law against the Tidmores if the plaintiff shall desire to avail himself of them on a future trial.

Having shown that there is error in the ruling of the Circuit Court in the rejection and admission of the evidence,

we will not stop to consider the charges. The questions of law presented by them have been often adjudicated by this court, and if our decisions are observed, there will be no room for misapprehension. Kennon v. McRea, 7 Port. Rep. 175; Kenan v. Holloway, 16 Ala. Rep. 56; Dearing v. Moffitt, 6 Ala. Rep. 776; Garnett, ads, Jordan, 3 Ala. Rep. 610; Milton v. DeYampert, ib. 648; Br. Bank at Mobile v. Tillman, 12 Ala. Rep. 214; Posey & Coffee v. Br. Bank at Decatur, ib. 802, and other cases.

For the errors we have shown, the judgment is reversed, and the cause remanded.

CHILTON, J., not sitting.

COLE, ADM'R., *vs.* CONOLLY.

1. A plaintiff in detinue, whose title to the property sued for is legally divested before the trial of the cause, can recover nothing beyond his damages for its detention to the time of such divestiture, and the costs of the suit.
2. A judgment or decree of a court, having jurisdiction of the parties, and the subject matter, however erroneous, until reversed or annulled, is binding upon them as to every question directly decided.
3. Where one, in possersion of the property of a third person, surrenders it in obedience to the mandate of a court of competent jurisdiction, issued in a proceeding to which such third person is a party, it is a full defence to a suit brought against him by the latter for the recovery of the property.

Error to the Circuit Court of Dallas. Tried before the Hon. Nathan Cook.

THE facts of this case appear fully in the opinion of the Court.

GEORGE W. GAYLE & JUDGE, for plaintiff:

The verdict is erroneous: 1st, in not assessing the value of the slaves, or any of them—Bell v. Pharr, 7 Ala. 807. 2d. In not allowing damages for the detention up to the trial—Carroll v. Pathkiller, 3 Porter, 280. 3d. In not finding for the plaintiff

for the slaves—he having title, according to the *special* verdict, *at the commencement of the suit*,—Bettis, adm'r v. Taylor, 8 Porter, 564; Bell v. Pharr, et al, 7 Ala. 807. Also, if Coles' title was divested, *in a week after suit was brought*, as found by the jury, the verdict should have been for the slaves. Oden v. Stubblefield, 2 Ala. 684.

2. The judgment is erroneous:—1st, It should have been for the slaves, or their alternate value, when it is for neither. Brown v. Brown, 5 Ala. 508.—2d, *A venire de novo* should have been awarded: 1 Ala. 52.

3. The court below erred—1st, In permitting the record from the U. S. Court to go to the jury. 2d, Cole was neither a *party* or *privy* to any of the proceedings evidenced by it. Blann v. Chambless, 9 Porter, 412.—3d, It was *irrelevant* for the *two* purposes for which it was introduced, viz: First, it could not show that Coles' title was divested by the seizure under the attachment, as detinue *involves the title at the time of suit brought*. Bettis adm'r v. Taylor, 8 Porter, 564—a *legal dispossession* to protect a defendant in detinue must be *before* suit brought, if any will. Caldwell v. Ford, Riley's Rep. 277; Kershaw v. Boyd, 1 Brev. Rep. 301; Lowry v. Houston, 3 Howard's (Miss.) Rep. 304; Lynch v. Thomas, 3 Leigh's Rep. 642; Burnley v. Lambert, 1 Wash. Rep. 308. A dispossession *afterwards*, cannot protect him, or "the death or destruction of the chattel sued for," would do so. Bettis adm'r v. Taylor, 8 Porter, 564; Bell v. Pharr, et al. 7 Ala. 807; White v. Ross, 5 Stew. & Port. 132; Carroll v. Early, 4 Bibb, 270; Gentry v. Barnett, 6 Monroe, 115; Merrett v. Merrett, Martin's (N. C.) Rep. 18; Skipper v. Hargrave, ib. 74. Secondly, It could not show title legally in a third person, or Borland's morgagee, because the *original mortgage is not produced*, nor its absence accounted for, and *because* when the morgagor has possession the legal title (except between the mortgagor and mortgagee) remains in the mortgagor. Morrison v. Gardner. 12 Ala. 547. Thirdly, It was *irrelevant* again, because it produces a conflict of jurisdiction between the State and Federal Courts. Detinue is a proceeding *in rem*, and this suit was brought *before* the attachment issued from the U. S. Court. That it is a *proceeding in rem*, see Clay's Dig. 208 § 37; Lindsey v. Perry, 1 Ala. 203; 4 Am. Com. Law, 324-5; 3 Ala. 747; 7 Ala.

812. The plaintiff's right to *elect* to take the property sued for, or its value, gives him a *lien* upon the property at the commencement of his suit. The *lien* of the plaintiff attaching at the commencement of the suit in detinne, cannot be divested except by a paramount lien: Rives & Owen v. Wilborne, 6 Ala. 45; Kemp, et al. v. Porter, 7 Ala. 138, 53; Hogan v. Lucas, 10 Peters' Rep. 400. Conoly should have filed a bill of interpleader and enjoined the Marshal: 1 Kent's Com. 410: Brown v. Ogden, 6 Halst. 370; Slocum v. Maberry, 3 Wheat. 2; 7 Martin's (La.) Rep. 416.

Evans & Hunter, for defendant:

1. The judgment of a court having jurisdiction of the subject matter, is conclusive, between parties and privies until reversed. 1 Greenl. Ev. § 522; ib. § 550, § 531; Warbuton v. Aiken, 1 McLean's Rep. 460; Swaggart v. Harber, 4 Scammon, 364; Lagrange v. Ward, 11 Ohio Rep. 257; Wyman v. Campbell, 6 Porter, 219; Gregnon's lessee v. Astor, 2 How. (U. S.) Rep. 319; Crawford v. Simonton, 7 Porter, 110; Elliot et al. v. Pearsall, et al. 1 Peters, 340; Thompson v. Tolmei, et al. 2 Peters, 163, 169. And this will be the effect, notwithstanding the record may abound with irregularities, which would authorise the reversal of the judgment by a revising court. 10 Peters 449; Wyman v. Campbell, 6 Porter, 219; Williams, et al. v. Armroyd, et al. 7 Cranch, 423; *Ex parte* Watkins, 3 Peters, 193; Skillems' ex'rs v. Mays ex'rs, 6 Cranch, 267; U. States v. Nourse, 9 Peters 8; Swiggart v. Harber, 4 Scammon, 364. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. Per Mr. Justice Baldwin in Gregnon's lessee v. Astor, 3 Howard 340—as to jurisdiction vide same case, 341; 6 Peters, 729, and the other authorities cited in other parts of the brief.

2. Independent however, of the decree, which we maintain is of itself conclusive upon the plaintiff Cole, we can well rest our defence confidently upon the writ of attachment and seizure, issued out of the court of the U. States, and under which the slaves were taken from the possession of the defendant. It was regular on its face—it commanded the seizure of the

specific property; it was a full justification to the Marshal in seizing the slaves, and could not be resisted by the defendant, except by force, which the law neither required or permitted. The Governor v. Gibson, 14 Ala. 326. The effect of the seizure was to place the property seized under and within the jurisdiction of the Circuit Court of the United States, and is binding, whether there has been personal service or not. Story's Confl. Laws, 462–3; ib. 496; ib. 440–41; Barrow v. West, 23 Picker. Rep. 270; Holmes v. Remson, 20 Johns. 229; 1 Kent's Com. 410. The defendant here, cannot be responsible for the subsequent irregularities (if any) in the proceedings of the U. S. Court.

3. A defendant in detinue may show that he was dispossessed by legal process after suit was brought. Lynch v. Thomas, 3 Leigh's Rep. 682; The Gov. v. Gibson, 14 Ala. 326.

4. Judgment may be for damages without recovery of the chattel. Bethea v. McClennon, 1 Ired. 523; 2 Bacon's Abr. 316; Steph. Com. 1313.

CHILTON, J.—This was an action of detinue brought by the plaintiff in error against the defendant, to recover sundry slaves named in the pleadings. Upon the trial, the defendant pleaded *non detinet*, with leave to give in evidence any special matter which could be specially pleaded, either *puis darrien continuance* or otherwise, with like leave to the plaintiff in respect to his replication.

The jury returned into court a special verdict, by which they certify that at the time the action was commenced by the plaintiff, he, the said plaintiff, had the title to the slaves sued for, and the right to recover the same, but that about one week after the suit was instituted, the plaintiff's title was divested under, and by virtue of proceedings had in the United States Circuit Court sitting at Mobile. They further find, under the charge of the court, that the defendant unlawfully detained said slaves from the plaintiff, for the space of one week, and assess the damage, by reason of such detention, to the sum of twenty-five dollars; and upon this verdict, the court gave judgment for the plaintiff for the damages so assessed.

From a bill of exceptions, it appears that the plaintiff showed that he was the administrator of Abram Borland, deceased,

and that the said Abram was the owner of the slaves, and had them in possession at the time of his death, which happened in November 1845. Having also proved the value of each slave, the possession of the defendant, and a demand for them before the bringing of the suit, the plaintiff rested.

The defendant then proved that after the death of Borland, one Magee, acting as deputy Marshal for the Southern District of Alabama, took said slaves from the plantation of Borland and left them with the defendant, as the sheriff and jailer of Dallas county, to be kept for him; and that while said slaves were thus in the defendant's possession, this action was brought to recover the same. The slaves having remained a week in the defendant's possession after the commencement of this suit, were taken from him by Robert L. Crawford, then deputy Marshal of the United States for the Southern District of Alabama, and conveyed to the city of Mobile.

The defendant then read in evidence a transcript from the records of the Circuit Court of the U. Ssates for the 5th circuit, from which it appears that on the 9th May 1846, the Bank of the State of Georgia, filed a supplemental and bill of review against the Bank of Darien, John H. Walker and Anne, his wife, Lafayette Borland, Kenan Borland, John M. Cole and John F. Conolly, who are citizens of the State of Alabama, charging among other things, that on the 26th July 1822, the said Abram Borland, made his certain deed of mortgage embracing the property in controversy in this suit, to the plaintiff to secure certain debts then due said plaintiff of $17,664: That in the lifetime of said Abram Borland, proceedings were commenced against him in said Circuit Court for a foreclosure of said mortgage, upon which at the December term, 1842, the said debt was ascertained, but the court failed to make a decree for a sale of said property. The bill then avers the death of Borland, leaving Anne, the wife of Walker, Kenan and Lafayette Borland, his heirs at law, having made a will, appointing John A. Walker his executor: That a bill of revivor was filed against the heirs and executor and the Bank of Darien, which had also taken a mortgage with notice of plaintiff's mortgage, and a final decree was afterwards rendered, by which the debt of the plaintiff was ascertained to have been at that time $18,570 24, and the debt due the Bank

of Darien $9,147 84, and an order of sale was made—first, that the slaves be sold, and secondly, for the sale of the lands, &c. That said bill of revivor was filed under the mistaken impression that Walker had obtained letters testamentary upon the estate of Borland, but complaint had since learned that letters of administration had been granted to the defendant Cole: That defendant, Conolly, sets up claim to indemnity before he will surrender the slaves, &c. The bill prays for an order to the Marshal to seize the slaves upon the ground that they are unsafe in Conolly's possession, and that they be sold in satisfaction of the mortgage in obedience to the order of the court, &e.

The subpœnea appears to have been executed on all the defendants except Cole, the plaintiff in this suit. The Judge of the District Court made a *fiat*, that upon the complainant entering into bond, &c., the Marshal should be commanded to seize the slaves and secure them so as to abide the final decree. Afterwards, they were ordered to be sold, the Marshal having on the 11th May 1846, taken the slaves into his custody, by virtue of an order commanding him to do so, issuing from the said court by virtue of the fiat above mentioned, on the 9th day of May 1846. The slaves were sold the 27th June '46 by the Marshal, and the proceeds broght into court. The bill was taken for confessed as against *all* the defendants, and the cause heard *ex parte*, and a decree rendered, appropriating the fund in satisfaction of the mortgage debt. There was no evidence, that when Magee seized the slaves, he had any warrant for so doing.

The plaintiff objected to the introduction of this record from the Circuit Court, but his objection was overruled, and he excepted. The proof tended to show that the slaves sued for, were taken from Conolly's possession by the Marshal, in virture of the writ of attachment above mentioned. There being no evidence offered to impeach in any way the proceedings evidenced by the transcript, the court charged the jury, that the said record and the facts disclosed therein, were *prima facie* a protection to said defendant from the time the slaves were taken from him by the deputy Marshal, provided they were satified from the proof in the cause, that the slaves were actually taken by said Marshal as stated in said record, and

that the slaves so taken were the same now sued for, and the said John Cole mentioned in the record is the same who now sues as plaintiff, but that although the seizure under such circumstances would protect the defendant from the time it was made, he would be liable for the time he held them before they were seized. The plaintiff asked the court to charge the jury, that if the proceedings and suit in said record set forth, were commenced after the institution of this suit, the said proceedings will constitute no defence for the defendant in this action, under his plea *puis darrien continuance*, nothwithstanding said record be unimpeached by extraneous evidence, and the facts be as therein stated, and they be satisfied of the identity of the slaves and the parties therein named with the parties to this suit, and the slaves now sued for.

The plaintiff also asked for the further charge, to wit, that the record of the suit in the Circuit Court did not show that the plaintiff Cole, had been notified or served with process, and for this reason, the proceedings evidenced by the record were void as to him, and could not in any way affect or prejudice his rights; which charges the Circuit Court refused to give, and the plaintiff now assigns these several matters for error.

The main question, and indeed the only one, which it is necessary to notice in this case, is whether the record of the proceedings and decree had in the Circuit Court of the United States, constitutes a justification for the defendant in surrendering the slaves in controversy to the Marshal, and whether he can avail himself of such defence in this action. For it is very clear that if the seizure by the Marshal of the slaves in suit, amounts to a divestiure of the plaintiff's title, he should not be permitted to recover damages for the detention of the slaves after that period, nor is he entitled to a judgment for the slaves themselves. It is ceartainly true that this court has uniformly decided, that the defendant is not permitted to show the death or destruction of the chattel, pending the suit, in order to avoid a recovery; but these decisions must be limited to the principle decided by them, and do not apply to cases, where the right of the property which the plaintiff had at the time of the institution of the suit ceases pending the controversy, and the property has been delivered over to the true

owner before the trial. For example—if A, hires a slave from B, for the space of one year, and C, pending the term, obtains the possession of the slave, and unlawfully detains him, and A brings his action of detinue, but before the trial, the year expires, and the slave is delivered up by C to B, the owner: in such case, the plaintiff not being entitled to the slave, at the time of trial, can have no judgment for his recovery, but is entitled to the damage, which he has sustained by reason of the unlawful detention.

By the rules of pleading, before the passage of our recent statute upon the subject, the defendant must have availed himself of this matter by plea *puis darrien continuance*, which must also have been accompanied with the cost, and the tender of such damages as had accrued up to the time of filing the plea, and which amounted to a waiver of the pleas previously relied upon.

When it is said that the unlawful detainer at the time the suit is brought is the gist of this action, it must not be understood as asserting that nothing happening after suit brought can affect the plaintiff's right to recover the specific property or its value. The mortgagee after default, is entitled to recover the property, but if after suit brought the mortgagor shall fully pay off and discharge the mortgage debt, it would hardly be contended that the payment would not amount to an answer to the suit, except as to the cost. So if the property has been restored to the plaintiff pending the action, he would be entitled to his damages and cost only.

The doctrine that the defendant shall only be liable in damages for the time that he unlawfully detains the slaves, and may plead a surrender *puis darrien countinuance*, was fully asserted by the court of North Carolina, in Bethea v. McClennon, 1 Iredell, 523; see also Penny v. Davis, 3 B. Monroe, 313, and Glascock v. Hays, 4 Dana, 58–61. It is evident that the defendant would, upon the payment of the recovery, if it should be for the alternate value of the property, only be entitled to the interest which the plaintiff had in the slaves, at the time of the trial, for I understand the legal rule, *solutio pretii emptionis loco habetur*, applies as well in the action of detinue as trover or trespass. If then the plaintiff in this case only had a right to the slaves in controversy for one week,

while the defendant had them in possession, there is no rule of law, as there is certainly no principle of justice, which would authorise a recovery for damages up to the time of trial, or for the value of the slaves. We conclude therefore, that if at the time of trial, the title was not in the plaintiff, he could not have judgment for the slaves, and consequently there was no error, upon this hypothesis in the rendering of the judgment by the court for the damage only. The defendant may show title in a third person at the time of instituting the suit in bar of the action, or that the plaintiff's title ceased, pending the action, in bar of the further prosecution of the suit, except as to the cost and damages. Dozier v. Joice, 8 Port. Rep. 303.

We then turn to the main and only question of difficulty in the cause—the legal effect of the record which was read in evidence.

The plaintiff made out a *prima facie* case, by proving that he had title at the time the action was brought, and that the defendant was then in possession of the slaves sued for. He thus cast upon the defendant, in order to defeat the action, the necessity of showing that he had been deprived of the property by due course of law.

The defendant insists that the record, showing the seizure of the slaves by the Marshal, their sale and the ultimate appropriation of the money arising therefrom to the satisfaction of the mortgage debt, which constituted a lien upon said property, is enough to exonerate him from liability. On the other hand it is contended by Cole, that he was no party to the proceedings under which the property was sold; or rather, that he was never served with process to appear upon said trial, and consequently the judgment should not be binding against him.

It will be borne in mind, that no effort was made on the part of the plaintiff to impeach the judgment in any way, so that the question is not whether the record is conclusive upon the supposed rights of the plaintiff, but whether *prima facie*, it operated a divestiture of title, and thus relieved the defendant from his liability for failing to deliver the slaves.

We have examined with care such authorities as have fallen within our reach, most of which are collected and commented upon in 3 Phil. Ev. 903–915, note 637, and which

were reviewed at some length in Wyman, et al. v. Campbell, et al., 6 Porter's Rep. 219, and have attained the conclusion that the Circuit Court, in the admission of the record as evidence, and in the charges given to the jury, as well as the charges refused, did not mistake the law.

The plaintiff resided in this State: He was made a party to the proceedings, and although there is no return of the Marshal showing he was personally served with process, still there appears a decree *pro confesso* against him, and also a final decree predicated thereupon. The subject matter of the proceeding, evidenced by the record, as well as Cole the present plaintiff, were within the jurisdiction of the court, the extent of whose jurisdiction being exercised within our own State, we are bound judicially to know. 1 Greenl. Ev. 64, § 6. After the rendition of the final decree, Cole was entitled to his appeal or writ of error to reverse the judgment or decree of the court, to which he would not have been entitled, had he been a stranger to the proceedings. That the decree as against him is irregular and reversible there can be no doubt; but we think it is equally clear, both upon reason and authority, that until reversed, notwithstanding it may abound with errors, it is obligatory upon him. The destinction between void and voidable judgments and decrees, is ably taken in the case of Voorhees v. The Bank of the United States, 10 Peters' 449, by Baldwin J. who says, "the line which separates error in judgment from usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record, importing absolute verity, in the other, mere waste paper: There can be no middle character assigned to judicial proceedings which are irreversible for error."

If the decree obtained by the Bank of Georgia in this case, does not *prima facie* operate a divestiture of Cole's title as administrator, then, upon abandoning his suit against the defendant in the case at bar, he could maintain an action for the slaves against the purchasers under the decree; for it is very clear, that if the proceeding is absolutely void as against Cole,

the purchasers of the property can acquire no rights under it which can protect them against his claim. But I apprehend no authority can be found which sanctions such a doctrine. If the court had jurisdiction, the purchaser is not required to go beyond the order authorising the sale. Were the law otherwise, judicial sales would become traps and snares for honest men. Thompson v. Talmis, 2 Peters, 165; Grignon's lessee v. Astor, 2 How. (U. S.) Rep. 342; 2 Peters 169; 11 Mass. Rep. 227; 11 Serg. & Rawle, 429.

The judgment is not void, but erroneous merely, and valid against all persons whose rights are affected by it, be they either parties or privies, until the same shall have been reversed.

But there is another view of this case which is satisfactory to my mind to show that the defendant is protected by this record. He was the mere stakeholder of the slaves when they were taken from his possession by the order of a court of competent jurisdiction, and over which order he had no control. The Marshal was commanded to seize them by the the attachment, and the defendant was bound to yield obedience to the mandate of the court, and was punishable if he did not do so. They were taken from him by the act of the court, it may be by proceeding *inverso ordine*, but the court nevertheless having jurisdiction over the subject matter. The rule is, "when a person does an act by command of one exercising judicial authority, the law will not suppose that he acted with wrong or improper motive, because it was his bounden duty to obey"—Broom's Maxims, 67. It would be unjust and absurd it seems to me, to hold that the law will not excuse a party for doing what it requires to be done, and as in this case, the defendant was deprived of the property by the order of the court of competent jurisdiction in a proceeding to which the plaintiff was a party, and which if erroneous, he has the right to reverse, or have reversed, the defendant should not be held bound for the delivery of the slaves, or for damages for their detention beyond the time they were in his possession.

In either view, we think the Circuit Court correctly instructed the jury as to the effect of the record. Let the judgment be affirmed.

FRY *vs.* THE BRANCH BANK AT MOBILE.

1. The levy of an execution on real estate does not divest the title of the defendant, and if the execution is retured without a sale, and the defendant die before any further proceedings are had thereon, the title descends to the heirs at law.
2. In this State, an action of trespass *quare clausum fregit* to recover mesne profits will not lie in favor of a disseissee, unless he has *regained the possession*, and that too *by entry*.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

This was an action of trespass *quare clausum fregit*, instituted by the plaintiff against the defendant in error for rents and profits of the premises mentioned in the declaration. The case was submitted to the judgment of the court below on an agreed state of facts, which so far they are necessary to be recited are as follows: William W. Fry, the ancestor of the plaintiff and George W. Fry owned the premises jointly. In 1839, William W. Fry died, but before his death, the defendant recovered a judgment against him in the County Court of Mobile, on which execution issued and was levied on the premises in question. The execution was returned without a sale, and no further proceeding was had under this levy, until 1844, when a venditioni exponas issued, and was delivered to the Marshal of the Bank, who proceeded to sell and make a deed for the premises to the defendant, the purchaser at the sale. After the sale the defendant, finding Foster & Battelle and another in possession of the premises under a lease from George H. Fry, threatened to dispossess them, unless they would pay rent to the defendant to the extent of W. W. Fry's interest in the premises, and thereupon they acknowledged themselves to be the tenants of the defendant and paid the defendant one half the rent, until the property was placed in charge of a receiver by the Chancery Court of Mobile at the instance of certain persons who held a mortgage on it, executed by William W. Fry in 1835. The amount of rent received by the defendant was $950. Before the purchase by

defendant, the estate of W. W. Fry had been declared insolvent. The court rendered judgment for the defendant, and the plaintiff now assigns it as error.

P. PHILLIPS, for the plaintiff:

1. The venditioni exponas issued after the death of Fry was void, and consequently the Bank could derive no title under it. Erwin's lessee v. Dundas, 4 Howard, 58; Abercrombie v. Hall, 6 Ala. Rep. 657.—Again, the writ was directed to the sheriff, and could not be executed by the Bank Marshal. Adamson v. Parker, 3 Ala. Rep. 727; Gresham v. Leveritt, 10 ib. 384; Governor v. Lindsay, 14 ib. 658.

The questions are, can trespass be maintained by an heir, and is the defendant subject to the suit? It is said by Plowden, that an heir could not maintain trespass; the reason is, that by the decisions in England, *actual* possession is necessary to maintain the suit, but in this State, as in most of the other States, the rule is otherwise, and where there is no adverse possession in another, the possession will *constructively* attach to the title. Rowland v. Rowland, 8 Ohio, 40; Robinson v. Douglass, 2 Ark. Rep. 364; Wilcox v. Kenzie, 3 Scam. 224; Kenedy v. Wheatly, 2 Hay. 402; Gillespie v. Dew, 1 Stewart, 229; Blevens v. Cole, 1 Ala. Rep. 210; Ledbetter v. Fitzgerald, 1 Pike, 448; Congregational Society v. Baker, 15 Verm. 119; Dobbs v. Galledge, 4 Dev. & Bat. 68; Bulkles v. Dobbear, 7 Conn. 233.

If the tenants of their own will had held over for 1845, they would be trespassers, as much so as if they had not obtained possession legally for the previous year. Conway v. Starkweather, 1 Denio. 113; Doe v. Adams, 7 Halst. 99; Danforth v. Sargent, 14 Mass. 491; Bedford v. McEtherson, 2 S. & R. 49. If they held by the direction of the Bank acting as landlord, and receiving the rent, the Bank would be as much liable in this action as if it had entered upon the premises and used them for its own purpose. Gregory v. Piper, 9 B. & C. 591; Clifton v. Grayson, 2 Stewart, 412. Every unwarranted entry upon another's land is a trespass, and a void license is no justification. Wells v. Howell, 19 Johns. Rep. 385; Chandler v. Edson, 9 ib. 362.

J. T. Taylor, for defendant:

1. Is not the title of the Bank only *voidable*—16 Johns. 537; 1 Chip. 390; 2 Halst. 180; 4 Watts. 367; 2 N. S. 730; 4 Whart. 339; 5 G. & J. 359.

2. The levy in the lifetime of W. W. Fry, divested him of title, and nothing decended to his heirs—3 Gilp. D. C. R. 54–51; Litt. Sel. Cases, 29; 1 Cond. (U. S.) Rep. 519; 3 Mass. 525.

3. One dissiezed cannot maintain trespass until after entry made, though he has the best title, and the entry and levy of the sheriff was a virtual dissiezin of plaintiff's ancestor—4 Greenl. 16; 1 Shiply, 87; 20 Maine Rep. 223; Mass. 525; 1 Metc. 528; 10 Pick. 161; 17 Mass. 299; 15 Mass. 414; 4 Mass. 416.

To maintain trespass plaintiff must have had actual possession, or else the *immediate right* to possession—See U. S. Digest, 3d vol. 530, and cases cited. And the possession of a lessee, is not sufficient—3 McCord, 432; 1 Hill, S. C. 260; 8 Pick. 235; 8 Mass. 411–415; 1 Johns. 511.

DARGAN, J.—Two questions are presented for the consideration of the court. First, did the levy and sale pass the title of W. W. Fry the ancestor of the plaintiff, to the Bank? Secondly, if it did not, will trespass *quare clausum fregit* lie, under the facts agreed on to recover the rents received by the Bank?

Although the levy had been made on the land by virtue of the original *fi. fa.*, yet as it was returned without a sale, and nothing further was done to enforce the lien acquired by the judgment, for more than four years, and after the estate of W. W. Fry was declared insolvent, it is very clear, that the lien was lost, and that the sale gave the Bank no title. Fitzpatrick v. Edgar, 5 Ala. 499; Burk's adm'r v. Jones & Allen, 14 Ala. 167; see also Lucas v. Price, 4 Ala. 679; Abercrombie v. Hall, 6 Ala. 657. It is however contended, that as the levy was made before the death of W. W. Fry his title was divested, and therefore his heir took nothing by descent. We will not here enquire what would have been the effect of a sale under the original *fi. fa.* before its return, but after the death of Fry, by virtue of a levy made during his life. But as no sale was

made under that process before its return, nor any further proceedings taken until the estate of Fry was duly declared insolvent, no title passed by the sale to the Bank. A levy on real estate, under our statutes, unlike a levy on personalty, does not invest the sheriff with the title; he cannot by force of the levy, enter upon or oust the defendant, or receive the rents and profits; but the title remains in the defendant until the sale and execution of the deed by the sheriff, by which the title of the defendant in execution passes to the purchaser, and he may then bring ejectment to recover the possession. As the levy did not divest the title of W. W. Fry, it remained in him until his death, and then descended to his heir at law.

2d. Will trespass *quare clausum fregit* lie, to recover of the Bank the rents received by it? As no actual injury was done to the premises, nor the plaintiff put out of possession by force, trespass to recover the *mesne* profits can only be sustained upon the ground that the facts constitute a *disseizin* in law. We, however, will decline an examination of the question, whether the facts do constitute a technical *disseizin* of the plaintiff, or whether he might elect to consider himself disseized, for if it were admitted, that under the circumstances, he was dissiezed, and the defendants were the disseizors, yet the action of trespass *quare clausum fregit* would not lie to recover the mesne profits; for the plaintiff has never regained the possession either by suit or by entry; and it is well settled at common law, that trespass will not lie to recover rents or mesne profits, until the owner, who was disseized, has recovered in ejectment, or in some other manner regained possession—then he may maintain this suit for the recovery of the mesne profits; for after an entry by the lawful owner, or after he has recovered in ejectment, the law, by a kind of *jus postliminii*, supposes the free-hold all the time to have continued in him. Chit. Pleadings, vol. 1, 177; 19 Wend. 507; Graham v. Houston, 4 Dev. 232; Shields v. Henderson, 1 Littell, 239; 4 Cowen 329. By statute, however in this State, a plaintiff who regains possession by action of ejectment or trespass to try titles, may recover the rents in that action by way of mesne profits, and therefore cannot be permitted to bring trespass *quare clausum fregit* to recover the rents where he has recovered possession in either of these actions. Cummings, et al. v. McGehee, 9

Porter, 349. Consequently the action can only be sustained in this State, in those cases where the dissiezee has regained possession without a suit in which he could have recovered the value or amount of the rents. The facts admitted show that the defendants continued to receive the rents until a receiver was appointed to receive them, under an order of the Chancery Court, made in a suit brought on the mortgage, executed in 1835, by W. W. Fry to Remsen & Eslava. We are not at liberty under this evidence to infer that the plaintiff has ever regained the possession of the premises, even if we could consider, that the acts of the defendant amounted to a disseizin of the plaintiff. Under this view of the case, there is no error in the record, and the judgment must be affirmed.

HEARRIN, Adm'r, *vs.* SAVAGE, Adm'r.

1. Where an administrator *de bonis non* pays to a former administrator a sum of money, which he advanced, during his administration, to satisfy a demand with which the estate was justly chargeable, he is entitled to an allowance for the sum so paid, in the settlement of his accounts.
2. The reasonable fees of attorneys, who were retained *bona fide* by a former personal representative to protect the interests of the estate, are, when paid by the administrator *de bonis non*, proper allowances in his favor, and, being part of the expenses incident to the administration, the sum so paid cannot be abated, although the estate is declared insolvent.
3. Where, in consequence of the neglect of the administrator to take possession of the slaves of the estate, they are removed to another State, the estate is not liable for the expenses and compensation of an agent and attorney, employed by a creditor, who pursues and recovers them, without any contract with the administrator.
4. If, after a decree of insolvency, the administrator pays in full claims which are not privileged, or which create no lien on the estate, he will occupy the place of the creditors, and is only entitled to a *pro rata* allowance. But in such case it would be proper upon the settlement of his accounts to permit him to retain the *pro rata* shares of the creditors whose claims he represents, if they can be ascertained before a final dividend is declared.

Error to the Orphans' Court of Clarke. Tried before the Hon. Terrell Powers, Judge.

In 1843, P. T. Harris qualified as executor of Thomas L. Starke, deceased, was succeeded in the administration by Billups Gayle, who resigned in December 1845, and he by the defendant in error, who was appointed administrator *de bonis non* in January 1846, and upon whose representation the estate was declared insolvent on the 14th December 1846. The plaintiff in error was then selected and qualified as administrator. Upon the final settlement of his administration by the defendant in error, he produced in support of an item of $412.50 on the credit side of his account, as paid to B. Gayle, the receipt of F. S. Blount, Esq., from which it appeared that as the attorney of the plaintiff in an execution in favor of one Davis against said Gayle as administrator, said Blount had received from Gayle the amount above named, to be credited on the execution, and which amount so paid by Gayle had been repaid to him by the defendant in error. The plaintiff in error objected to the allowance of this credit, on the ground that it was an illegal and improper credit, and should have been brought forward in Gayle's own settlement, but the court overruled the objection and allowed the credit. In support of a credit of $210 for money paid to Torrey & Williams, it was shown that $20 of it was for professional services rendered by them as attorneys at law to P. T. Harris, executor, $70 for professional services rendered to B. Gayle, administrator, and $40 for a trip by Williams, one of said attorneys, to Mobile, and services there rendered at the request of defendant in error. It was further shown in reference to this item, that the object of the visit to Mobile was to attend to the proper application of a sum of money in the hands of the sheriff, that was claimed adversely to the interest of the estate, under an execution in favor of the Bank of Mobile; and that John Gayle, Esq. an attorney residing in Mobile, had also been employed, and had defeated the claim of the bank, before the arrival of Williams. The plaintiff in error objected to the allowance of the several amounts of $20 and $70 above named, on the ground that they were illegal and improper credits, and should have been brought forward in the settlements respectively of Harris and Gayle, and to the

credit of $40 as not a legitimate charge under the facts disclosed against the estate; which objections were overruled, and the whole credit allowed. In support of a credit of $250 paid Campbell & Chandler, it was shown that suit had been instituted against Thomas L. Starke in his life-time in the U. States Court at Mobile on the Receiver's bond of one Owen, upon which said Starke was a surety; that it was successively revived against Harris and Gayle as Starke's representatives; that Campbell & Chandler were employed to defend it, and finally succeeded in defeating it during Gayle's administration; and that the $250 was paid them by defendant in error as their fee in the case, after the estate was declared insolvent. To the allowance of this item also the plaintiff in error objected, on the ground that the administrator Gayle should have settled it, and that the defendant in error had no right to pay it after the decree of insolvency. The court overruled these objections and allowed the credit. In reference to a credit claimed for a considerable sum of money paid to John Gayle, Esq., it was shown that a part of it was for professional services rendered to B. Gayle as administrator, and which were beneficial to the estate, and a part for expenses and compensation in going to Louisiana in pursuit of, and in capturing and bringing back to Alabama about forty negroes belonging to the estate, which had been run off by one of the heirs. It was proven that Gov. Gayle was employed in this business by the Branch Bank at Mobile, a large creditor of the estate, and that no contract was made by him with the administrator to perform this service. The court allowed the entire credit in opposition to the objection of the plaintiff in error. A credit was claimed of $200 paid to B. Gayle for assisting in the capture of these slaves, and similarly disposed of. Other credits were claimed for payments made to the several banks in Mobile, the objections to which are sufficiently noticed in the opinion of the court. To the rulings of the court respectively exceptions were taken, and they are now assigned as error.

A. B. Cooper and Vary, for plaintiff in error:

1. Where an administrator has paid a debt against the estate of his intestate, he alone must seek the allowance of such payment in his own settlement with the Orphans' Court. He cannot settle his administration, or any part of it, with his suc-

cessor in the administration.—Clay's Dig. 229, § 41. 2. An administrator has no power to contract debts which will bind the estate to a creditor.—2 Port. 33. 3. When an administrator has paid out monies on account of the estate, he must show to the Orphans' Court that such expenditure was necessary, reasonable and proper, otherwise he is not entitled to have them allowed in his account and settlement with the court. 4. A judgment is an admission of assets. Hence an administrator has clearly the right to retain assets sufficient to pay judgments obtained against him, and altho' B. Gayle had resigned, yet it presumed that *he* had retained assets sufficient to discharge the judgments. Savage was no party to those judgments, or either of them, and was not liable to pay them.—Gayle, adm'r, v. Elliott, 10 Ala. Rep. 264. 5. After the estate was declared insolvent, and an administrator *de bonis non* elected by the creditors, Savage was no longer the administrator of the estate, and had no right to pay a creditor his claim or any part of it. If he had been continued in the administration after the decree of insolvency, still he would not have had the right to pay a creditor his claim and to include such payments in his account and settlement.—Clay's Dig. 194, § 10.

CAMPBELL and BLOUNT, for defendant in error:

1. The statutes of the State authorise a settlement between the administrator and the administrator *de bonis non.* The want of privity which formerly existed has been removed by the operation of those statutes. The administrator *de bonis non* may collect by suit the estate of the decedent in the hands of the administrator. He can do so without suit.—Clay's Dig. 227, § 30; Act of Feb. 4, 1846. 2. If Savage was discharged from his administration, and afterwards intermeddled with it, he became an executor *de son tort.* He is entitled as such an executor to a credit for all the debts legally paid by him.—9 Mass. 74; 7 Cow. 64; Lomax on Ex'rs, 78, 79; 2 Hawk., 544; 1 Cas. in Ch. 33. 3. The question of a devastavit in the payment of some claim, preferably to others, does not arise between the administrator *de bonis non* and the administrator. The creditors are alone parties to such an issue.

COLLIER, C. J.—When an executor or administrator shall be displaced, all money due to him in his representative

character, by execution or otherwise, shall be paid to his successor. Clay's Dig. 227, § 30. The act of February 1846, authorises the Orphans' Court to render a decree upon final settlement with an executor or administrator who has resigned, died, or been removed, in favor of the administrator *de bonis non* or of the heirs or distributees, for any balance that may be found due. Clay's Dig. 191, § 1; see also Skinner v. Frierson and Crow, 8 Ala. 915; Dunham v. Grant, 12 Ala. 105.—The cases cited expressly determine that an administrator ceases upon the resignation of his trust to represent the estate, and that he cannot maintain an action to recover its assets, not even upon a note payable to himself in his representative character. In Gayle, adm'r, v. Elliott, 10 Ala. Rep. 264, it was decided that the duties and authority of an administrator, as such, determine with the renunciation of his trust and the settlement of his accounts, but he can only absolve himself from liability by delivering the estate to his successor.

It may perhaps be proper for an executor or administrator, upon resigning, to protect himself by satisfying judgments or other liabilities against him as such; but if he does not, and afterwards discharges them from his own estate, he will not be compelled to bear the loss. His successor in the administration may reimburse him, and if the assets are ample, may be compelled to do so. If this were a doubtful question at common law, the modified state of the law in this State makes it clear that the administrator may retain for his advances, or if he allows the estate to pass into the hands of an administrator *de bonis non*, he becomes a creditor, at least. If the personal representative, who contracted or incurred liabilities, relinquishes the trust and turns over the assets to a successor, the latter will be authorised to discharge them, if they were primarily a just charge upon the estate. This is but reasonable, for the estate should bear its own burdens, no matter to whose hands its administration may be entrusted.

In O'Neill v. Donnell, 9 Ala. Rep. 734, it was held that there was no general rule to determine when costs incurred by an administrator in respect to the assets of the estate shall be allowed; every such case must depend upon its own peculiar circumstances. "It is evident, however, there is one fact which must exist in every case, to warrant the allowance of

costs, outside of the administration. This is the *bona fides* of the act by which the costs are incurred. This seems to have been the conclusion in Morris v. Murgatroyd, 1 Johns. Chan. 473, where Chancellor Kent felt the difficulty, but allowed the charge. So in the case before us, it is impossible to say the party was justified in the trespass, or that if damages had been recovered, these could be a proper charge; yet we think the counsel fees were properly allowed, because whether an actor or a defendant to the suit, the title was necessary to be ascertained, and could not well be done without the employment of counsel." It was also decided that an administrator may be allowed for *extraordinary services*, but no difficulty in making inventories, sales, or keeping accounts, is to be so considered. So in Harris v. Martin, 9 Ala. Rep. 895, the administrator was an attorney at law, and had performed valuable professional services for the estate in prosecuting and defending suits, &c., and the question was whether he should be allowed compensation for them in the settlement of his account: *Held*, that the Orphans' Court was authorised to allow compensation to the administrator, if the litigation was *bona fide* for the benefit or demanded by the necessity of the estate; but the amount of the compensation is to be ascertained, not by the usual estimate placed on such services, but the criterion of value is what a prudent administrator would be inclined to pay an attorney, considering the condition of the estate—taking care under no circumstances to allow specific fees in each case.

After the report that the estate of a deceased person is insolvent is comfirmed, the executor or administrator shall on a day to be appointed by the Orphans' Court make a settlement of his accounts, and notice shall be given to the creditors to attend. On the day appointed for the attendance of the creditors, they shall hold a meeting under the direction of the court, and may elect and nominate to the court some suitable person as administrator *de bonis non* of such estate; and upon such person taking the oath and entering into bond with sufficient surety, letters of administratration shall be granted him accordingly. Clay's Dig. 192, 193, §§ 2 to 6. *Further*, "whenever any administrator *de bonis non* shall be appointed according to the provisions of this act, any former grant of letters testamentary or of administration of the said estate shall be thereby

revoked; and all the goods, chattels, moneys, choses in action, and other personal effects belonging to the said estate, shall be thereby vested in such administrator *de bonis non;* and he shall be entitled to demand and receive from the former executor or administrator, all moneys found due and owing from him to the estate, and all such goods, chattels, choses in action, and other personal effects, and deeds and other evidences of title to real estate, and may recover the same by any proper proceeding or actions, either in the Orphans' Court or any court of common law or equity, against such former executor or administrator and his securities." Clay's Dig. 194, § 9. The effect of the decree of insolvency is to transfer to the Orphans' Court the entire jurisdiction of all claims against the estate.—With a few exceptions, all debts are placed on the same footing, though the estate be solvent, and when it is insolvent, the fund for distribution is to be equally divided amongst all the creditors who are not thus privileged. Edwards v. Gibbs, 11 Ala. Rep. 292.

1. This view of the law appropriate to the questions arising upon the record, may serve as aids in their solution. First then, in respect to the sum of four hundred and twelve dollars and fifty cents, which was paid by the defendant to B. Gayle his predecessor in the administration, if it went to reimburse the latter an advance he had made for the estate, while he was administrator, in the payment of a demand with which it was chargeable, it follows from what we have said, that it was properly allowed in the settlement of the defendant's account. The form of the exception indicates that it was not objected to for a defect of proof, but that the character of the claim was such as we have supposed.

2. The account of Torrey & Williams for professional services rendered P. T. Harris and B. Gayle, the defendant's predecessors, is a proper charge against the estate, if these gentlemen were retained *bona fide* to vindicate or protect its interests. We are authorised from the form of the exception to infer that they were thus employed, and that the charges are reasonable. As for the forty dollars which was charged and allowed in this account for Mr. Williams' visit to Mobile, at the request of the defendant, to supervise the appropriation by the sheriff of that county of money in his hands belonging to

the estate, it must be disallowed. It seems that the defendant was represented in Mobile by counsel, whose duty it was to attend to the same business, and that the attention of the latter had caused the business to be adjusted beneficially to the estate before Mr. Williams reached Mobile. The employment of additional counsel so far as we are informed by the record was wholly unnecessary, and the estate cannot be subjected to a charge for his compensation. What we have said in respect to all but the last item of Torrey & Williams' account, will apply to the sum paid to Campbell & Chandler, and show that it was properly allowed. It was part of the expenses incident to settling the estate, and should not be abated in consequence of the insolvency of the estate. If a different rule was applied, and such a claim was placed upon the footing of that of an ordinary creditor, it would be difficult for the executor or administrator to settle an estate which turned out to be insolvent without subjecting himself to a personal liability. Counsel, unless a stipulation was made to the contrary, would be authorised to look to his personal responsibility for payment, and it would be the extreme of injustice if he could not retain from the estate for his own indemnity. If upon withdrawing from the administration, he neglects to retain, but passes over the assets to his successor, he may look to the latter for payment, and though the estate be insolvent, his claim will not abate *pari passu* with ordinary creditors. We have seen that upon the election and qualification of the plaintiff, the defendant was discharged from the administration, and any subsequent disposition of the assets would make him an executor *de son tort*. This then must have been the character in which the defendant paid the demand, or he must be considered as the purchaser of the claim; in either event he is entitled to be allowed it in the settlement of his account. The citations for the defendant in error upon this point are pertinent, and satisfactorily establish the conclusion we have expressed.

3. The items in the account of J. Gayle for professional services, if reasonable and proper, are a just charge upon the estate. But as he pursued and recovered the slaves that had been removed from this State, under a contract with the branch Bank at Mobile, without any previous agreement with the defendant, the estate is not liable for his expenses, person-

al inconvenience, loss of time, &c. It was the duty of the defendant to take possession of the slaves and subject them to the administration whenever they came within his reach, and he would only have been authorised to pay for having placed them there, when he had made a previous contract with some one for that purpose.

There was no pretence for allowing the defendant the two hundred dollars he paid B. Gayle for having assisted in bringing back the slaves to this State, not only for the reason that he did not go in pursuit of them under a previous contract, but for the additional reason that he charged nothing for the services he performed.

4. In respect to the payment of the several sums to the Banks, to the allowance of which the plaintiff objected, it may be remarked generally, that these paymenrs were made after the decree of insolvency; that it does not appear they were privileged claims, or that the creditors had such lien as entitled them to be paid *in toto*. This being the case, the defendant was not authorised to pay them, and having done so in his own wrong, he can only stand in the place of the creditors and receive a *pro rata* allowance from the assets subject to distribution amongst the creditors. True, instead of requiring him to deliver over to the plaintiff all the assets, the Orphans' Court may permit him to retain so much as he was entitled to upon the debts paid after his authority ceased, if this sum can be ascertained before a final dividend is declared.

This view is decisive of all the questions presented, and may serve as a guide to the ulterior proceedings in the court below. The judgment is reversed, and the cause remanded.

LOCKWOOD *vs.* NELSON.

1. T. M. N. and A. M. C. in contemplation of marriage enter into a contract, by which it is covenanted and agreed, that the said T. M. N., the intended husband, on the consummation of the marriage, shall have and receive all the property of the said A. M. C., and in consideration thereof, and in lieu of dower, shall settle on the

said A. M. C. for her own proper use and benefit, free from his liabilities, a sum of money equal to the value of the property thus received, and charge his estate to that extent: *Held*, that on proof being made that the marriage was solemnized, and that the said T. M. N. thereupon received from the said A. M. C. property of the value of twenty thousand dollars, a deed of trust, afterwards executed, in consideration of the provisions of said contract, by the said T. M. N. to W. N. N., to secure to the said A. M. C. the payment of the said sum of twenty thousand dollars, is not voluntary, but is founded on a full and valuable consideration.

2. Where the *only* question raised on a deed of trust, by charges asked, is whether it is *voluntary*, or on *valuable consideration*, a charge in lieu of those requested, that if the jury believe from the evidence that certain facts existed, they constituted the *cestui que trust* a *bona fide* creditor, must be construed in reference to the question presented, and cannot be regarded as withdrawing from the jury the consideration of the *motive* which induced its execution.
3. The assent of creditors to a deed of trust for their security will be presumed, when no condition is imposed prejudicial to them, or restrictive of their rights.

Error to the Circuit Court of Tallapoosa. Tried before the Hon. Geo. W. Stone.

This was a trial of the right of property in three slaves, which, on the 12th day of April 1847, were levied upon under an attachment in favor of plaintiff in error against Thomas M. Nelson, and claimed by William N. Nelson, the defendant in error, as trustee of Anna Matilda Nelson, and of certain creditors of the said Thomas M. The plaintiff having made out a *prima facie* case, the claimant read in evidence a marriage contract, executed on the 19th December 1838, by the said Thomas M. and Anna Matilda, then Anna Matilda Carnes, by which, after the recital, that a marriage is about to be solemnized between the said Thomas M. and Anna Matilda, and that the latter is possessed of property to the value of twenty thousand dollars, all which, on the consummation of the marriage, the said Thomas M. is to have and receive as the said Anna Matilda's marriage portion, the said Thomas M. "in consideration of said portion and intended marriage, covenants and agrees to settle and charge his estate in the sum of twenty thousand dollars, for the benefit of the said Anna Matilda Carnes and her heirs, being a sum deemed equivalent to her

fortune," and "doth by these presents grant and settle on the said Anna Matilda Carnes and her heirs, out of his estate, the sum of twenty thousand dollars in lieu of dower, and the property received through her, for her own proper use and benefit, free from any liabilities of the said Thomas M. Nelson." In connection with this contract, it was proven that the marriage was consummated, and that the said Thomas M. thereupon received property of the said Anna Matilda to the value of twenty thousand dollars. The claimant also read in evidence a duly recorded deed of trust, executed to him by the said Thomas M. on the 22d September 1846, by which the said Thomas M, in consideration of the provisions of said marriage contract, conveyed to the claimant a number of slaves, among them a portion of those levied on, "to have and to hold in trust for the part payment of said marriage settlement." There was no proof, however, that the said Anna Matilda had ever accepted of the provision, made for her in this deed. The claimant further read in evidence a duly recorded deed of trust, executed to him by the said Thomas M., on the same day that the other was, by which, a number of slaves and other property, including a portion of the slaves in controversy, were conveyed to claimant, in trust to secure the payment of the debts due by the said Thomas M, to certain creditors therein named, and proof was made of the bona fides of the debts thus provided for, but it did not appear that the creditors had ever accepted of the provision made for them by this deed. The debt on which plaintiff's attachment was sued out, was contracted by the said Thomas M, in 1845. Upon this state of facts, the plaintiff's counsel requested the court to charge the jury:

1st. That the trust deed, of the 22d September 1846, for the benefit of Mrs. Nelson, was voluntary, fraudulent, and void—a mere donation, as against the creditors of the said Thomas M. Nelson whose demands were in existence at the time.

2d. That the trust deed, for the benefit of Mrs. Nelson, was but the execution of a power, revocable by the grantor at any time before its acceptance by her, and that the levy of the attachment, before such acceptance, is tantamount to a revocation by the grantor.

3d. That the trust deed, for the benefit of creditors, was but the execution of a power, revocable by the grantor, at any

time before acceptance by the beneficiaries, and that the levy of the attachment before such acceptance operates as a revocation.

The court refused to give either of these charges, but instructed the jnry, 1st That, if the said Thomas M, and Anna M, entered into the antenuptual contract of the 19th December 1838, and afterwards intermarried, and the said Thomas M. thereupon received property from the said Anna M, of the value of twenty thousand dollars, the said Anna M, then became a bona fide creditor of the said Thomas M, and the trust deed for her benefit would be upheld, provided it conveyed property of no greater value than twenty thousand dollars: 2d, That the law presumes the assent of the beneficiaries to the provision made for them in the respective deeds of trust, they being on their face beneficial to the creditors. To the refusal of the court to give each of the charges asked, and to each charge given, the plaintiff excepted and now assigns them, severally, as error.

RICE, MORGAN & HEYDENFELDT, for plaintiff:

1. The ante-nuptial agreement executed by Thomas M. Nelson and Anna M. Carnes, in 1838, is merely *executory;* it is not an *executed* contract and is not a marriage *settlement.* It is a mere *agreement to make a settlement.* But whether it be the one or the other, it is condemned by the law respecting marriage settlements. That law "requires a *fair motive,* as well as a valuable consideration, and the interest must be *actually declared and vested at the time of a settlement,* or it cannot prevail against the rights of honest creditors." Rundle v. Murgatroyd's assignees, 4 Dallas' Rep. 304.

2. A contract between *husband and wife previous to marriage,* for the settlement of the WIFE'S FORTUNE, is released by the marriage. This is *certainly* true in a court of law, and probably in a court of equity. Boatwright & Glaze v. Wingate, 3 Brevard's Rep. 423; Darcy v. Chute, 1 Cases in Chancery, 21; Acton v. Peirce, 2 Vern. Rep. 481, and cases in note 1.

3. The general principle is, that those contracts only are thus extinguished, which *may by possibility* be enforced or performed *during the marriage.* Gibson v. Gibson, 15 Mass. Rep. 111. But a provision made for the wife in contemplation of

marriage, which BY THE TERMS OF IT, is *not* to take effect until *after the death* of the husband, or until *after the coverture ceases*, is not extinguished by the subsequent marriage. Gibson v. Gibson, 15 Mass. Rep. 111; Mitchel v. Mitchel, 4 B. Monroe's Rep. 380.

4. It is a settled and uniform rule, that settlements made upon a wife and children by persons who have not a sufficient estate to pay all their debts, are void against creditors. Rundle v. Murgatroyd's assignees, 4 Dal. Rep. 304; Read v. Livingston, 3 Johns. Ch. Rep. 481.

5. The deed to the claimant "for the *part payment* of the above mentioned marriage contract" &c., cannot be valid against the then existing creditors of the grantor, until the assent of the beneficiary was shown.

6. The affirmative charge given by the court is erroneous in several particulars, to wit: 1st, It precluded the jury from any enquiry into *the intent*—the *bona fides*, in making the deed to the claimant for the benefit of Mrs. Nelson. 2d, It precluded the jury from any enquiry into the condition of the grantor—whether he was solvent or insolvent at the date of the trust deeds. 3d, It assumed that if Mrs. Nelson was a bona creditor, that the deed must be held good, although it may have been executed with intent to defraud creditors, and although there may have been a secret trust in favor of the grantor, and although the property *did remain continuously in the possession* of the grantor. 4th, It assumed that Mrs. Nelson was a *bona fide creditor*, merely because *her fortune*, at the time of her marriage was $20,000, and was received by her husband, under the agreement between herself and husband executed *before the marriage*, whereas the cases before cited, show the law to be otherwise than as charged by the Circuit Court.

L. E. PARSONS, for defendant:

1. Concede the marriage settlement to be a mortgage, and that in consequence of the neglect to record it, the mortgage is lost, *yet the debt remains.* This *debt* is secured by the trust deed.

2. If the marriage settlement is a mortgage, its lien is not lost because of the failure to record it. Adams v. Broughton 13 Ala. Rep. 31.

3. But this marriage settlement is not a mortgage. It is an acknowledgment on the part of Thomas M. Nelson, that he has received property to the value of twenty thousand dollars, for which he agrees to settle on her, out of his estate, (viz, *pay* her out of his estate) that sum, and in lieu of dower also. This is an indebtedness which will support the subsequent conveyance to W. N. Nelson. The assent of Mrs. Nelson to this deed will be presumed—Elms v. Sutherland, 7 Ala. 262; Gazzam v. Poyntz, 4 Ala. 374. To render an ante-nuptial settlement void as a fraud upon creditors, it is necessary both parties should have notice of the fraud—Andrews & Brothers v. Jones, et al. 10 Ala. 400.

4. The trustee has full power to *pay* the debt in such manner as the beneficiary may desire. The authority conferred on him for this purpose is general, and this authorises him to use all legal and proper means to that end. He is to hold it in *trust* for the *part payment* of the marriage settlement. The object of the trust is "to pay" and the trustee is not limited to any particular mode or manner of payment. If the deed contained a power of sale, its terms would have to be followed; but where no terms are imposed and the power to do the act is given, the trustee may select—Chambers v. Mauldin, 4 Ala. Rep. 477.

5. But the right to make this conveyance is expressly provided for in the marriage contract, and the acceptance of it by the wife, is a part of the contract, *provided this deed*, in the opinion of the court, amounts to a charge on his estate.

CHILTON, J.—By the ante-nuptial contract entered into between Thomas M. Nelson and Anna M. Nelson, then Anna M. Carnes, it was agreed, that the said Thomas M. should have the property of which his said intended wife was then possessed, amounting in value to twenty thousand dollars, and that in consideration of that, and in lieu of the dower of his said intended wife, he covenanted "to settle and charge his estate in the sum of twenty thousand dollars, for the benefit of the said Anna M.—being a sum deemed equivalent to her fortune." The deed further provides "that the said Thomas M. Nelson doth by these presents grant and settle on the said Anna Matilda Carnes out of his estate, the sum of twenty

thousand dollars in lieu of dower, and of the property received through her, for her own proper use and benfit, free from any liabilities of the said Thomas M. Nelson." This deed was executed the 19th December 1838. The proof shows that the marriage contemplated by the deed, was afterwards solemnized between the parties, and that the said Thos. M. actually received property to the value of twenty thousand dollars from his wife upon the marriage.

The manifest intention of the parties to this instrument was, that the husband should settle upon the wife, to her sole and separate use, the sum therein specified, and not having paid the money before the consummation of the marriage, it is very clear that a court of equity would hold him as a trustee for his wife, and chargeable with that sum as for her separate estate. Atherly on Marriage Settlements, 90 *et seq.* He was in fact her debtor, and was under both a moral and legal obligation to comply with the terms of the contract, upon the faith of which, it is fair to presume, the wife was, at least in part, influenced to enter into the marital relation. There was then no valid objection to securing by the husband, after the coverture, the debt thus due by a conveyance of property to a trustee for her benfit, as was done by the deed of 22d September 1846 to William N. Nelson, the claimant. This deed was not therefore voluntary, as is assumed in the first charge asked to be given by the Circuit Court to the jury on behalf of the plaintiff in error. The security was but a means of consummating the settlement—5 Ves. 275. The rule is too well settled to admit of discussion, that if a party do that which a court of equity would compel him to do, the court will hold it good. And the authorities to which we are cited by the counsel for the defendant in error establish beyond doubt, that a court of equity would enforce the wife's right to the settlement provided for by the ante-nuptial contract. The wife in this case has but an equitable interest, the legal title being vested in the trustee, but her equity is a sufficient consideration to support the deed.

2. The charge of the court, that if the jury believed certain enumerated facts existed, they constituted the wife a *bona fide* creditor of the husband, we think is free from error, and cannot be regarded as withdrawing from the jury the considera-

tion of the motive which prompted to the execution of the trust deed. The charge has reference to the *consideration* of the deed, and was given in lieu of one which was denied, and which assumed it to be voluntary. The questions raised below, were "upon the construction of the deed," and no question of fraud in fact was made by the charges asked, and hence none were concluded by the first charge given.

3. The remaining two charges which were prayed come directly within the influence of the principle several times decided by this court, and which must be considered as settled law, viz: that where a trust deed is executed for the security of creditors, and provides that the creditor should do or omit any thing whatever, the deed is revocable until the creditor assents to it; but where such is not the case—where the deed provides a security, without imposing any terms upon the creditor, or in any manner postponing the collection of his demand, the provision being manifestly for his benefit, the law implies his assent, and the deed is not revocable by the grantor. Elmes v. Sutherland, 7 Ala. Rep. 262; 4 ib. 374; Nelson, et al. v. Dunn, 15 Ala. Rep. 501. Applying the rule thus settled, to the case before us, it is very clear that the court did not err in refusing the two charges which assume, that the deeds of trust under which the claimant held the property required the assent of the *cestui que trusts* before the levy of the attachment, in order to render them valid. Neither of the deeds postpone the time of payment of the demands secured by them, and no condition whatever is imposed upon the creditor. They were then, upon their face beneficial to the creditors, and needed not their assent to give them vitality.

The charges given but affirm the law, as we have above laid it down, and were strictly correct. Having noticed all the points presented to the court below, and being unable to discover any error, the judgment must be affirmed.

THE HEIRS OF BRYANT *vs.* STEARNS.

1. Where land descends to six heirs, and some of them, without the concurrence of the others, transfer to a third person one undivided seventh part of the whole, it is not erroneous, on an application for partition under the statute, to divide the land into six equal parts only, and proceed to a partition without noticing the claim of such third person.
2. The statute requires, that in a proceeding for partition, the surveyor and chain-carriers shall be sworn prior to the survey, and that the survey shall be made in the presence of the commissioners, but these facts need not appear *in the return*. The legal presumption is, that the commissioners have done their duty, until the contrary is shown.
3. The mere fact that one of several coparceners, or tenants in common, is a lunatic, does not divest the jurisdiction conferred by the statute in proceedings for partition.
4. The Judge of an Orphans' Court has jurisdiction of an application for partition under the act of 1803 (Clay's Dig. 386.) The jurisdiction vests in him *as Judge*, and whether he be called the Judge of the County Court, or the Judge of the Orphans' Court, is wholly immaterial.
5. A proceeding under the act of 1803 for partition is not such a judgment, sentence or decree, as will sustain a writ of error. *Certiorari* is the only process by which it can be brought under review.

Error to the Orphans' Court of Tallapoosa.

Wm. H. Stearns petitioned the Judge of the Orphans' Court for partition of certain lands, alleging that he was entitled to one sixth part equally with five others, who as heirs at law held by descent from William H. Bryant. One of the five, William Bryant, is stated to be a lunatic. On the filing of the petition, an order was made that three persons, naming them, be appointed commissioners to divide the land, unless objections be made before the Judge on the first Monday in August thereafter. On the first Monday in August, two of the heirs appeared and objected to the petition, but what their objections were does not appear. On their motion, however, the application was continued until the first Monday in September. On the first Monday in September, a guardian *ad litem* was appointed to defend for the lunatic, who denied the allegations of the petition; but the facts and issues being found in favor of the petitioners, the three individuals, previously named, were

appointed and a commission issued to them to make partition according to the prayer of the petition. They were duly sworn, proceeded to make the partition, and divided the land described into six equal parts, and, after having given the requisite notice to all the heirs, proceeded by ballot to allot to each his share in severalty, and made return to the Judge under their hands and seals, showing the manner in which they had executed the commission, and the share allotted to each. Two of the heirs filed objections to the return of the commissioners, each of which was overruled by the Judge of the Orphans' Court, and the partition confirmed and ordered to be recorded. The objections urged below are severally noticed in the opinion of the court, and the overruling of them is the error here assigned.

McLester, for plaintiffs in error.

Morris, contra.

DARGAN, J.—The first assignment of error is, that the land should have been divided into seven instead of six shares, in consequence of an agreement under seal, by which Needham Bryant and General J. Bryant, two of the heirs, and William F. Stearns and Joel Mayberry, who had intermarried with two of the daughters of William Bryant, deceased, transfered to Bodicia, the widow, one seventh part of all the real and personal estate of her deceased husband. There are six heirs, but the agreement is signed by two only, and the husbands of two of the females, who are entitled as heirs and distributees to participate in the division of the estate. It is very clear that this agreement can operate only on the shares or interest of the two heirs that have signed it, and the other four are entitled each to one sixth part. The agreement, however, may be binding personally on the husbands of the two daughters who are parties to it—yet it cannot have the effect of vesting in the widow any title to the land, to the prejudice of the rights and interests of their wives, who are entitled by descent each to a sixth part, but who have not by any act of theirs conveyed any share of their interest. The agreement, then, can only operate on the interest of two of the heirs, if it can operate to give her title to any portion. The four heirs

are entitled to one sixth each. This being the condition of the legal rights of the parties, we can see no objection to a partition into six equal shares, as Bodicia, the widow, may assert her rights, notwithstanding the partition, either against the shares of the two heirs, Needham and General J. Bryant, or personally against all the parties to the agreement, as she may see fit, or be entitled. But if it be admitted that she could demand one seventh from those whose interest in the land may be bound by the agreement, or that she could sue all of the obligors for not allotting to her one seventh part, yet as the interest in the land of four of the heirs is not in any manner bound by it, we think the partition is well made, without noticing her rights under the agreement, or making her a party to the proceedings, leaving her to assert her claim, if any she has, as she may see proper.

2. The second assignment of error is, that the return made by the commissioners of the division of the land does not show that the surveyor and chain-carriers were sworn before they proceeded to survey the land. It is true that the statute requires that surveyors and chain-carriers shall be sworn that they will well and truly perform their respective duties, before the land is surveyed, and it is made the duty of the commissioners, previous to the survey, to have this oath administered. (Clay's Dig. 386, § 4.) But the question is, whether it is indispensably necessary that the return of the commissioners should show this fact. The statute requires that the commissioners shall transmit the writing containing their appointment and their oath or affirmation of office, certified by the person administering the same, and the map and field book, and also their accounts, to the Judge from whom they received their appointment, or in case of his death, resignation or removal, then to any Judge of the same court, who, after inspecting the same, shall order such instruments to be recorded. Clay's D. 388, § 8. It is evidently the duty of the commissioners, before they proceed to survey the land, to administer the oath required to the surveyor and chain-carriers; and if such oath was not administered, the court to which a return of the commissioners is made should set it aside. But the question raised by the assignment of errors is, whether the return is defective, because it does not show on its face that such oath was admin-

istered. The statute that requires the oath to be administered also prescribes what the return shall contain, to-wit, the instrument of writing containing their appointment, their oath of office properly certified, and their map and field book. But it is not required that their return on its face should show that the surveyor and chain carriers were sworn. Shall the return and partition for this be set aside? The legal presumption must be, that the commissioners have discharged the duties required of them according to law, until the contrary appears, and we cannot infer that they have omitted so important a requirement in the absence of all proof. The law does not require that their return should show affirmatively that the oath was administered. It is therefore valid, though this fact be not stated in the return, if in fact the oath required was administered to the surveyor and chain-carriers. The plaintiff, therefore, cannot object to the partition on the ground alone that the commissioners' return does not show that the oath was administered, but he must go further and show by proof that it had not been done. As no such proof was offered, this assignment of error is unavailing.

The same answer must be given to the third assignment of error, which is, that the return does not show that the survey was made in the presence of the commissioners. It would be difficult to perceive how they could make the partition, having a due regard to the quantity and quality of each share, unless they were present and directed the survey. But the return need not state positively that they were present, directing the survey; this will be presumed, until the contrary is shown by proof.

The fourth error assigned is, that the time, place and manner of the allotment are not certified as directed by the statute. We have examined the return, and cannot pronounce it defective. The notice required of the time and place of the allotment was given, and the allotment was made by ballot in the manner prescribed by the statute, and the whole is certified by the commissioners. We can perceive no defect in the manner in which the share of each was allotted or set apart.

3. The fifth and sixth assignments of error question the jurisdiction of the Judge of the Orphans' Court to order the partition, because William Bryant, one of the heirs, was a lunatic,

and it is urged that this deprives the court of jurisdiction.—The language of the act of 1803 is, that any person being a coparcener, joint tenant or tenant in common of any tract or tracts of land within this State, may at any time apply to one or more of the Judges of the Circuit Courts of this State, or to any Judge of the County Court, wherein such lands may lie, for a partition of such tract or tracts of land, who shall ascertain the number of shares or parts in which such tract or tracts of land are held by the coparceners, joint tenants or tenants in common, and shall nominate three persons, not interested in said land, to make partition, &c. It is very certain that a coparcener, joint tenant or tenant in common is entitled to partition and to have his share alloted to him in severalty, altho' his co-tenant be a lunatic; and the jurisdiction of the Judge does not depend on the character of the co-tenants, but on the fact that the land is held jointly by parceners, joint tenants or tenants in common, and that some one of them, able to sue, makes application for partition in the manner prescribed by the act. When such an application is made, showing that the lands are held jointly by parceners, joint tenants or tenants in common, the jurisdiction of the Judge over the subject is complete, and he must proceed according to law to make the partition.

4. It is also contended, that the Judge of the Orphans' Court cannot claim to exercise this jurisdiction under the act of 1803, but obtains his jurisdiction from the act of 1806, the proceedings under which are different from those contemplated by the act of 1803. We think that the Judge of the Orphans' Court, as it is sometimes called in our statutes, has jurisdiction under the act of 1803, under which these proceedings were had. It is true that the language in this act is, that the application may at any time be made to any one or more of the Judges of the Circuit Courts, or to the Judge of the County Court of the county in which the lands may lie; but the Judge of the County Court and of the Orphans' Court is the same person in this State, and when he is spoken of in reference to business pertaining to a Court of Probate, he is frequently called the Judge of the Orphans' Court; when in reference to business not peculiarly belonging to a Court of Probate, he is styled the Judge of the County Court. But as the same person is Judge of

both courts, whether the jurisdiction be confered on him by the name of the Judge of the County or Orphans' Court is immaterial; it vests in him as Judge, and therefore he can legally exercise the powers confered on him by this statute, whether he be styled the Judge of the one court or the other, and if he proceeds in conformity with the act, his sentence, judgment or decree is conclusive. The act of 1806 does seem to contemplate a course of proceeding different from the act of 1803, but it certainly does not in any manner repeal the act of 1803, nor restrict or limit the jurisdiction of the Judge of the County Court; whether it enlarges the jurisdiction may well be doubted. It provides for partition in only two cases: where the tenants hold as devisees, or by descent, and some of them are under age, the Judge of the Orphans' Court may make partition in the manner pointed out in that act. As to whether partition can be made under the act of 1803, when one of the tenants is under age, *it is not necessary to express an opinion.* But when all the tenants are of full age, whether they hold by devise, by descent, or otherwise, they must hold either as coparceners, joint tenants, or tenants in common, and consequently any one of them is entitled to partition under this act.

5. Although we have examined the errors assigned, yet we come to the conclusion that the writ of error must be dismissed. A writ of error will lie to a final judgment or decree of the Circuit, County or Orphans' Court, but the proceedings, under the act of 1803 for the partition of land, cannot be said to be such a final judgment or decree, in the sense of that term, as authorises us to review it by a writ of error. It is true, it is of a judicial character, and is binding on the rights of the parties to the extent contemplated by the act. Yet the Judge does not sit as Judge of a court to which a writ of error may issue. For instance, if the application is made to one or more of the Judges of the Circuit Courts, it may be heard in vacation and decided in vacation, when the partition is completed. The proceedings may be ordered to be recorded in either the Circuit or County Court of the county in which the land lies. If the costs be not paid, the Judge himself issues an order to sell the land of the delinquent party for its payment. In such a case, should the proceedings be ordered to be recorded in the

County Court, to what court should we direct the writ of error? If to the Circuit Court, the clerk of that court could not certify the record, for there is no record of file in his court. If to the County Court, there is no judgment of the County Court. In the case supposed, we could not get the record before us by this process. The jurisdiction confered by the act is a special one, and the Judge who exercises it does not sit either as Judge of the Circuit or County Court, but, being Judge of the one or the other of those courts, he is clothed with authority to proceed and determine the matter according to the directions of the statute. The statute prescribes no mode by which these proceedings may be reviewed by an appellate court, and consequently a writ of error will not lie. The only process by which these proceedings can be reviewed and reversed, or affirmed, is by a writ of *certiorari*, which lies to review the acts and proceedings of any one exercising legal authority and pronouncing judgments or sentences, or decrees in the nature of judgments, if there be no other remedy provided by law by which their acts or judgments can be reviewed.

Let the writ of error be dismissed.

SCALES *vs.* DESHA, SHEPPARD & CO.

1. Where a note is made by J. H. S. and endorsed by R. S. and J. W. P. for the exclusive benefit of N. S.. and J. W. P. at the time of the transaction agrees to be bound equally with the maker and first endorser, and N. S. afterwards, with the assent of the parties, executes a deed of trust to J. H. S. to secure them, and the property conveyed is levied on and claimed by the trustee under the deed, J. W. P., on the trial of the right of property, is an incompetent witness for the claimant, nor is his competency restored by a subsequent release to the claimant and R. S. of all his interest in the security and a bond of indemnity from them to him against all further losses on account of N. S.
2. Where the deposition of a witness is taken, when he is incompetent, and his competency is afterwards restored, a second deposition taken whilst the first remains on the file of the court, in which the witness merely states, "that the facts, deposed to in the deposition of his as

aforesaid first taken, are true," will not authorise the admission of the first deposition as evidence.

3. In a trial of the right of property between one claiming under deed of trust for the benefit of certain creditors of the debtor and an attaching creditor, the debtor being dead and a decree of insolvency and distribution having been passed on his estate, his distributees are *prima facie* competent witnesses for the claimant.
4. If a witness, examined under commission, states facts which are admissible, but insufficient *per se* to make out the case, his deposition should not be excluded, if the party offering it announces his purpose to show their relevancy by other evidence.
5. Hearsay evidence is inadmissible.

Error to the Circuit Court of Talladega. Tried before the Hon. Nathan Cook.

This was a trial of the right of property in several slaves, levied on in July 1842, by virtue of an attachment in favor of the defendants in error against Nicholas Scales, and claimed by Joseph H. Scales, under a deed of trust executed to him by the defendant in attachment on the 21st October 1840. The claim was interposed by the plaintiff in error on the day of levy. During the pendency of the suit, which was tried at the Fall term 1848, Nicholas Scales died, and at the October term 1847, of the Orphans' Court of Talladega county, his estate was declared insolvent and final distribution of it subsequently made among his creditors. The claimant on the trial offered to read the deposition of James W. Perkins, to which the plaintiffs in attachment objected. It appears from the testimony of the witness, that in 1839, the claimant made a note of $3000, at six months date, which was endorsed by Robert Scales and the witness, and discounted at the Bank of Tennessee, for the exclusive benefit of said Nicholas Scales; that at the time of this transaction, the witness, notwithstanding he was the second endorser, agreed to be equally liable with the maker and first endorser for the amount of the note; that the deed of trust under which the claim was interposed was executed to secure the parties to said note; that, being informed that there was some difficulty about the property embraced in the deed of trust with the creditors of Nicholas Scales, the witness about the 10th February 1846 proposed to Joseph H. & Robert Scales, that each should pay his pro-

portional share of the note and stop litigation, to which they refused to assent; and that he thereupon assigned to said Joseph H. & Robert Scales all his claim against Nicholas Scales and took from them a bond of indemnity to secure him against all further losses on account of Nicholas Scales. This was not done to render him competent as a witness, nor did he know that it was in contemplation at the time to make him one. The court considered the witness incompetent and excluded his deposition from the jury. The claimant next offered to read two sets of depositions of Nicholas Perkins. The second states that at the time of his *first* examination he was interested in the event of the suit, but that *that* interest had been removed by a release prior to the re-examination, and the witness then goes on to testify, "that the facts, deposed to in the deposition of his as aforesaid *first* taken, are true." The claimant thereupon proposed to read the first deposition, but the plaintiff objected, and the court sustained the objection. The claimant thereupon offered to examine as witnesses Thos. H. P. Scales, Thaddeus Scales and Nicholas P. Scales, the sons and heirs at law of Nicholas Scales, deceasd. The plaintiff objected to them as incompetent witnesses and the court excluded them from testifying. The claimant likewise introduced Green T. McAfee, as a witness and the court excluded him on the ground that he was the husband of one of the daughters of Nicholas Scales, deceased. After the rejection of Thomas H. P, Thaddeus W, and Nicholas P. Scales, they executed a release to the plaintiffs in attachment of all interest in the slaves in controversy, and tendered it to the plaintiff's counsel, who refused to accept it, whereupon the court decided that they were still incompetent to testify. To prove the discount and renewals from time to time of the $3000 note at the Bank of Tennessee, the claimant offered to read the deposition of David Read, taken in a chancery cause in which the claimant was the complainant and plaintiff in attachment and others the defendants, and also the deposition of one Nichols taken in the same proceeding. The plaintiff moved to exclude the first, and certain portions of the other, which motion the court sustained. The several rulings of the court are now assigned as error.

McAfee & Jones, for plaintiff in error.

Rice, Morgan & Parsons for defendants:

1. Scales and McAfee being distributees of defendant in execution were incompetent witnessess. Carter v. Graves, 7 How. 6; Foster v. Nolin, 4 Miss. 18; Powell v. Powell 7 Ala. Rep. 582; Maury v. Mason, 8 Porter, 232; Powell v. Powell, 10 Ala. Rep. 910; Locke v. Noland, 11 Ala. Rep. 262; Williams' ex'r v. Temple, adm'r, 6 Ala. Rep. 656, and no release could render them competent. See cases cited *supra*—Hall v. Alexander, 9 Ala. Rep.—2. The release that was made falls within the influence of Mason v. Maury, 8 Porter, 232; and the *machinery* employed puts the case within the influence of Prewitt v. Houston, 8 Ala. Rep. 846.—3. The estate of the defendant in execution was declared insolvent, and the administrator discharged. The demand of the plaintiff in execution was never presented, and they had nothing but a lien on the property, which if defeated, they are barred by the statute of non claims, and the witnesses offered, being the distributees, are directly interested in putting the claim of plaintiffs in execution out of the way, as thereby they increase the fund for distribution.—4. There is no possibility of a balance of interest, as the witnesses are interested in getting rid of the lien of plaintiffs in execution upon the property—and on the other hand, have the right to redeem the property under the deed of trust; or if not redeemed, they will take the surplus when the deed is satisfied.—5. The deposition of Read was properly rejected as evidence, for he proved that all he had stated was mere hearsay—and so of the deposition of Perkins marked excluded.

COLLIER, C. J.—A release by a distributee to the administrator of all claims upon the estate, makes the distributee a competent witness for the administrator in a suit against the latter by a creditor of the estate; and the release is equally effectual to remove the interest whether it be founded upon a consideration or not. Hall v. Alexander, 9 Ala. Rep. 219; 3 Phil. Ev. C. & H's notes 1561; Boon v. Nelson's heirs, 2 Dan. Rep. 391. But a release to the administrator of "the demand in suit" is insufficient to make the distributee competent to es-

tablish a claim in favor of the estate; in such case a recovery will increase the fund to pay debts, and leave a larger amount for distribution, or if the administrator should be unsuccessful, the fund will be diminished by the payment of costs. Williams' ex'rs v. Temple, adm'r 6 Ala. Rep. 656.

In Maury's adm'r v. Mason's adm'r 8 Port. Rep. 211, it was held that a distributee cannot make himself a competent witness for the administrator by releasing all his interest in the estate to the co-distributees; that a release executed for such a purpose, whether valid or not as between the parties to it, will not, upon grounds of public policy, remove the disqualification. See also, Powell, et al. v. Powell, adm'x, 7 Ala. Rep. 582; Houston v. Prewitt, 8 Ala. Rep. 846; Powell, et al. v. Powell, 10 Ala. Rep. 900; Locke v. Noland, 11 Ala. 249; Bell v. Smith, 5 B. & C. Rep. 188; Scott v. Lloyd, 12 Pet. Rep. 145.

A release in order to remove the interest of the party releasing need not be actually delivered from the releasor to the releasee. If it be intended to operate as such, and presents an operative appearance to the court, it shall have that effect. A release good in form is available, though not actually delivered, but only entered on the minutes of the court. McCausland v. Neal, 3 Stew. & Port. Rep. 131; 2 Phil. Ev. C. & H's notes, 272; 3 ib. 1561, and cases there cited; 1 Greenl. Ev. § 429.

Bell v. Smith and others, 5 B. & Cresw. Rep. 188, was an action of assumpsit, brought in the name of Bell on a policy of insurance. The declaration averred that *Armet*, Gibb, Robertson and Wimble were at the time of the loss interested in the goods insured, to the full amount of the policy, and that it was made for their use and benfit. At the trial *Armet* was offered as a witness for the plaintiff. He was objected to as incompetent, and the plaintiffs gave in evidence a deed poll executed by A., before the commencement of the action, whereby he released to the plaintiffs all actions which he might have by reason of the policy, or for any monies to be recovered by them from the underwriters. They also gave in evidence an indenture executed by A. after the commencement of the action, whereby (after reciting the plaintiffs had effected the policy, that A. G. R. and W. were the persons interested,

that actions had been commenced in the names of the plaintiffs, and that they being desirous of an indemnity against the costs, the Court of Common Pleas had ordered A. G. R. & W. to indemnify, and that L. & R. had agreed to it; A. G. R. & W. in consideration thereof and of ten shillings, assigned to L. & R. all their interest in the policy, and all benefit to be derived therefrom, and all monies to be recovered in said actions to and for their own exclusive use and benefit: *Held*, that A. was at all events still liable to the attorney employed to bring the action, and therefore incompetent. *Abbott, C. J.* said, "I am of opinion that Armet was not a competent witness. There can be no doubt that originally he was substantially, though not nominally a plaintiff in the cause; and we ought not to be astute to give effect to that which makes the real plaintiff a witness. The action being for his benefit, although brought in the names of the brokers, it must, until the contrary is shown, be presumed that it was brought by him, and by his authority, rather than by those who had no interest in it. If the action was brought by his authority, either express or implied, he became liable to pay the attorney employed to bring it, and he is still under that liability, nothing having been done to deprive the attorney of his right to recover his costs from him. The machinery therefore (nothwithstanding all the contrivances adopted) has still left this objection open; and upon this ground alone, without going further, I think that there is sufficient to warrant us in saying that Armet had an interest in obtaining a verdict for the plaintiffs. He was therefore improperly admitted to give evidence." The other members of the court concurred.

1. It is distinctly admitted by the witness, J. W. Perkins, that although he was the second indorser of the note made by Joseph H. Scales for the accommodation of N. Scales, deceased, he was equally liable for its payment with the other parties to it, and bound to contribute (if necessary) as between himself, the maker, and the prior indorser, one third of the amount. His assent to the trust deed executed by N. Scales is also clearly inferable from the fact that it was beneficial to him, and though informed of it he never objected to its provisions or otherwise repudiated it. True after he learned that there would be some difficulty in making the security availa-

ble he proposed to the maker of the note and the first endorser that each of them should pay a proportionate part of it, and thus avoid the trouble and expense of a suit in defending the deed; but this proposition was not assented to. The witness then declared his unwillingness "to pay any costs, lawyer's fees, or any other sort of expenses;" and to make himself certainly secure, about the 10th February 1846, he assigned to Jos. H. and R. Scales all his claim against N. Scales, and took from them a bond of indemnity to secure himself against all further loss, &c. on account of N. Scales. This assignment was made without any other consideration than the bond of indemnity. Witness declares that he did not make the assignment for the purpose of rendering himself competent as a witness—he did not then expect to be called on to testify, nor does he know that such an event was contemplated by any one. The note refered to was made on the 7th August 1840—the claim interposed on the 9th July 1842 by the trustee, more than three years and a half previous to the assignment by the witness. It was the duty of the trustee when the property conveyed to him was attached, to assert the interest of the *cestui que trust*, either by interposing a claim under the statute, or in some other legal form. He was invested with the legal estate, and having accepted the trust, it was his duty to execute it; and perhaps he could not excuse its omission without the assent of the beneficiaries. Huckabee v. Billingsley at this term. The assent of the witness to the deed being implied, we must intend that the claim of property was made without objection by him, and therefore he is equally liable with the other beneficiaries for all legitimate consequences. Although the trustee is the sole claimant and liable alone to the judgment for costs, if he should be unsuccessful, yet the *cestui que trusts* being all interested in the litigation, are alike responsible for the costs and expenses attending it, and may be compelled by the claimant to contribute. The witness does not state at what time he declared to the trustee an unwillingness to incur any responsibility in defending the right to the slaves conveyed—conceding that such a declaration could absolve the trustee from the performance of what would otherwise be a legal duty. He however states that for the purpose of making himself secure, he made the assign-

ment and received the indemnity about the 10th February 1846. The irresistible inference from all this is, that he never objected to the claim of property until long after it was made, and consequently it was so initiated as to make it substantially the cause of all the beneficiaries. In this view of the question, it is clear that the witness when the assignment was made was liable to the claimant for such costs as had been previously incurred, as well as for counsel fees, and other proper charges, even conceding that a liability could not be enforced against him for these items of expense by the plaintiffs in attachment or the attornies retained by the claimant. If this be so, the cases cited conclusively establish that the witness had an interest which the assignment did not and could not divest. So that laying out of view the objection founded upon considerations of policy, the exclusion of the witness may well be defended upon the ground of interest.

2. It is not enough that a witness whose deposition has been taken is disinterested at the time the testimony is sought to be used, but every disqualifying interest should be removed before the witness is examined, or the deposition cannot be received as evidence. But a witness, whether examined at the bar *viva voce*, or out of court under a commission for that purpose, may be released and re-examined where his interest appears, and without such re-examination, his testimony given under the bias of interest will be rejected. 2 Phil. Ev. C. & H. notes, 261; 3 ib. 1561; 1 Greenl. Ev. 168. It is admitted that N. Perkins was interested, and therefore incompetent when his first deposition was taken; but his interest being removed by a release before his second deposition which affirmed the truth of the first was taken, it is insisted both depotions were admissible. If the first had been withdrawn from the files of the court under an order for that purpose, its truth reaffirmed, and it made part of the second, then it would have been admissible. Such however, was not the case. The witness merely states "that the facts deposed to, in the deposition of his, as aforesaid first taken, are true." Now the commission required the testimony to be transmitted to the Circuit Court, sealed up, &c. We may very well intend if it were necessary to sustain the decision below that the first deposition was an open paper on file when the second was taken, even con-

ceding that it would have been admissible under any circumstances, unless it had been enveloped with and constituted a part of the latter. The recital of the facts in the bill of exceptions does not authorise us to say that the last deposition was taken in such a manner as to legalize the admission of the first, and upon this point there is no available error.

3. It is difficult to perceive what interest the witnesses, T. H. P. Scales, N. P. Scales, Thaddeus C. Scales and G. T. McAfee have in the result of this cause. True, they are distributees of the estate of N. Scales, deceased, and will be entitled to share in it, if any thing is left after discharging its debts for distribution. But this is not a controversy with the administration, the result of which can in any manner increase or diminish the assets of the estate. It is a litigation in which the right of the plaintiff or claimant to charge the assets is in no manner drawn in question. The representative of the estate, if there was one, would have no interest in assisting or defeating either party, for the verdict and judgment could not in any manner affect him. Both parties claim under a lien paramount to the right of an administrator or the distributees; the plaintiff's lien originating by the levy of an attachment in the life time of the intestate, and the claimant's, under a deed of trust executed by the intestate before the attachment was sued out. In this view of the case, it seems to us, that these witnesses had no interest in the event of the cause—at most, their interest was balanced, and their testimony improperly rejected. We desire it however to be understood that our conclusion upon this point is founded upon the facts disclosed by the transcript before us, which are somewhat variant from the hypothesis on which the counsel for the plaintiffs below rest their argument, and may therefore be inapplicable if other evidence shall be adduced on another trial.

4. The deposition of D. Read though taken in a cause in chancery in which the plaintiffs and claimants with others, were parties, was by the agreement of counsel, to be considered as if taken in the cause now before us. We are then, only to inquire whether the facts stated by the witness are admissible evidence. Neither the bill of exceptions nor arguments of counsel, inform us for what reason the deposition was rejected, and even if some part of it is objectionable,

(which we need not enquire) we think it should not have been excluded *in toto*, if the claimant had announced his purpose to show its relevancy by other evidence. The witness certainly states some facts which are admissible, even if insufficient *per se*, to establish the fact of the indebtedness of N. Scales, deceased, if the claimants had shown that the deceased was connected with the transactions narrated. Upon offering the deposition, the claimant might have declared his intention to adduce the necessary assistant evidence, and if the deed of trust was before the jury, as we suppose it was, we should be inclined to think that the recitals upon its face were equivalent to such a declaration, and that the deposition should have been received. The court could have instructed the jury as to its legal effect. Upon this point it is needless to add more as the judgment must be reversed for an error already noticed. See Mardis' adm'r v. Shackleford, 4 Ala. Rep. 493; The P. & M. Bank of Mobile, v. Willis & Co. 5 Ala. Rep. 770.

5. The part of the deposition of W. Nichol, marked upon the transcript "excluded," was properly rejected. It is a mere statement that "for what purpose said note of $3000 was made, he does not know, but understood, at the time it was discounted, from some source, that the proceeds were for the benfit of some citizen of Alabama." This is nothing more than hearsay.

6. We will not stop to scan the refusal of the circuit judge to charge the jury as prayed. The legal questions arising upon it have been two often considered to make it necessary, and attention to our numerous decisions will prevent misapprehension or error upon a future trial, either on the part of the counsel or court. See Hooper v. Pair, 3 Port. Rep. 401; P. & M. Bank of Mobile v. Willis & Co. 5 Ala. Rep. 770; Mauldin & Terrell v. Mitchell, 14 ib. 814; Falkner v. Leith & Jones, 15 ib. 9, and many other cases.

It remains but to declare that the judgment is reversed, and the cause remanded.

CHILTON, J., not sitting.

WILLIAMS *vs.* SHACKELFORD.

1. Where the facts of a case are clear and undisputed, the court may charge directly upon them without hypothesis.
2. W., a resident of North Carolina, executed to C., of the same State, a power of attorney to receive a slave from S., who resided in Alabama, and to sell him: C. passing through Alabama on his way to Mississippi, received the slave from S. and endeavored to sell him, but failed to do so: He then endeavored to hire him, but in this also was unsuccessful, and, not being authorised to incur the expense of taking the slave along with him in the stage—the mode of conveyance by which he was travelling—he thereupon left him with S., free of hire, until W. could be informed of the circumstances and make some other disposition of the slave: *Held*—That in this unforeseen emergency, the agent acted in the line of his duty, and that S. is not liable for the hire of the slave.
3. The declarations of an agent, acting within the scope of his authority, and of the party with whom he contracts, when made at the time of a transaction, are a part of the *res gestæ*, and admisisble in evidence.

Error to the Circuit Court of Autauga. Tried before the Hon. John D. Phelan.

THE facts of this case appear fully in the opinion of the Court.

SAFFOLD, for plaintiff in error.

BUGBEE, contra.

CHILTON, J.—This was an action of assumpsit brought by the plaintiff in error against the defendant, to recover for the services of a negro man slave. Verdict and judgment for the defendant. It appears that the defendant, who resided in Autauga county, had at one time hired the slave from the agent of the plaintiff, who resided in North Carolina. The plaintiff gave to Charles H. Cooper a written power of attorney to receive the negro man and sell him. The said Charles, being on a trip from North Carolina to the State of Mississippi, called upon said defendant for the boy, who gave him up to him and paid him the hire which had accrued up to that time. The said agent then undertook to sell the boy, and re-

ceived one offer to purchase him, but the purchaser desiring to buy on a credit, which he did not feel authorised to give, they failed to conclude the arrangement. Being unable to make a sale of the slave, and travelling, as he testified, in the stage, and not being authorised to incur the expense of taking him along with him, and inasmuch as the plaintiff did not desire that the slave should be taken back to him, he concluded to hire him out, and proposed to the defendant again to hire him. This the defendant refused to do at any price, alleging that the slave was a bad negro, and old, and was injurious to his younger negroes on the plantation. Finally, however, the defendant consented as a matter of accommodation to keep the slave until Cooper, the agent, should return home to North Carolina and inform Williams, so that Williams could do with the slave as he pleased. The same witness, Cooper, stated that Williams did not authorise him to leave the negro any where, or to incur any heavy expense in taking him along with him, and that he left the slave with the defendant, not knowing any other person to leave him with, and for the reason that the owner did not want him back home. The foregoing, embracing the substance of all the proof in respect to the agency of Cooper, the court charged the jury that under the agency as shown by the testimony of Cooper, he had the authority to leave the negro man with the defendant, and that the said plaintiff could not recover anything from the defendant for the time he had so kept said slave. The court also refused to exclude from the jury the declarations of the defendant made to Cooper, that he would not hire the slave—that he was a bad negro, &c. To this refusal, and to the charge given by the court, the plaintiff excepted, and now assigns the same for error.

1. There was no discrepancy or conflict in the testimony. The question was, whether the agent, having a special authority to receive and sell the slave, upon finding it impracticable to make a sale, or to hire him out, had, under the testimony as shown by the deposition of Cooper, the legal right to leave the slave with the defendant without hire. The judge, in our opinion, did not invade the province of the jury in the charge which he gave, viz. that under the testimony of Cooper, he had the authority to leave the slave as he did, and that the plaintiff

could not recover for the time he was so kept. In Henderson v. Mabry, 13 Ala. Rep. 713, we held that where the facts were clear and undisputed the court might well give the law of the case as applicable to them, without hypothesis; the charge here complained of, when not subjected to too rigid a criticism, does nothing more.

2. Did the court correctly state the law? The agent's authority in writing extended to receiving and selling the slave. He had no authority to incur the expense of taking him on his journey back to his owner. He did receive him and endeavored to sell him, but failed. Here his agency, as confered by the *letter* of the power, ceased. What then should he do with the slave? Was it his duty to take no further care of him, and set him at liberty, by which means he may have been lost to the owner? Clearly not. Had he done this, and loss have ensued, he would have been liable to the principal. The performance of his agency having become impracticable, for want of a purchaser of the slave, and having him in charge, it was his duty to make such disposition of him as, under all the circumstances, would contribute most to the interest of his principal. Not being able to hire the slave to any one whom he knew, until the plaintiff could be advised of his failure to dispose of him, so that he might make whatever disposition he pleased with him, he left him in the care of the defendant, subject to the future order of the plaintiff, but without hire. We think he had ample power to do this, under the exigencies of the case. Judge Story, in his commentaries on Agency, section 141, remarks that although the powers of agents are ordinarily limited to particular acts, yet that extraordinary emergencies may arise, in which a person who is an agent may, from the very necessities of the case, be justified in assuming extraordinary powers, and that his acts fairly done, under such circumstances, will be binding on his principal. See authorities cited in note 1, p. 168, (2d edit.), and §§ 85, 118, 193, 194, 237. In section 194, speaking of this principle, he says, "It is a proper corollary from it, that any unavoidable calamity, or overwhelming force or accident, without any default of the agent, will excuse him from the duties of a strict performance of his agency; *for all such cases are deemed exceptions to the general rule: A fortiori*, if the strict performance becomes impos-

sible, without any default of the agent, he is excused. In the case before us, not being able to comply with the instructions of his principal, the agent, in this unforeseen emergency, could not have acted with greater propriety than to secure the safe custody and forthcoming of the property, free of cost to the principal, until he could be informed and could make such disposition of the slave as he chose; and the defendant, having refused to hire the slave, but taking him merely as an accommodation to the agent, is most clearly not liable for hire.

3. It results from what we have said, that there was no error in the charge of the court to the jury, and also, that as the law confered upon the agent the power under the circumstances to leave the property with the defendant, the declarations of the parties made at the time of such leaving, and explanatory of it, forming a part of the *res gestæ*, were competent evidence and properly allowed to go before the jury.

Let the judgment be affirmed.

POPE ET AL. *vs.* HARKINS ET AL.

1. A tenant is estopped from denying the title of his landlord, and interposing to it an outstanding title, which has never been asserted against him.
2. One tenant in common is liable to account to the other, for the rents and profits of the joint estate, received by him with the other's assent.

Error to the Chancery Court of Lauderdale. Before the Hon. David G. Ligon, Chancellor.

THE bill in this case was filed by the defendants against the plaintiffs in error. The facts are fully set out in the opinion of the court. The chancellor decreed in favor of the complainants and his decree is now assigned as error.

L. P. WALKER, for plaintiffs in error:

1. Pope has the right to dispute the complainants title, having been induced to recognise it by the representations of the complainants. Law Lib. Oct. 1846, 150; 2d U. S. Dig. 740,

§ 144; 2d Phil. Ev. C. & H. 202; Jackson, *ex dem.* v. Spear, 7 Wend. 401–304; 22 Wend. 121; 13 Johns. 537; 7 Wend. 401; 12 Wend. 105; 2 Johns. Cas. 223, 353; 8 Ala. 606, Randolph v. Carlton; 9 ib. 319.

2. Where respondent denies any title in the complainants they must establish it by proof. 1 Johns. Chan. Rep. 110; 3 ib. 304.

3. All of the rights of complainants are predicated on, and grow out of Pope's lease to Pearsall. But that lease was *rescinded* and *extinguished* by the burning of the tavern, which event made the performance of its conditions *impossible*, and therefore put an end to it. 5 Porter, 522; 7 Mass. 325–38; Coke Lit. 206. Hence their rights, being dependent upon the lease, when the latter was extinguished, were also at an end. The entire contract was gone, and if Pope has obtained any thing under it, it is his good fortune and the folly of Pearsall, and the complainants have nothing to do with it.

S. Parsons, for defendants:

1. As Pope had leased of complainants and held under them before the bill for the partition and account was filed, it was not necessary to allege any thing else for the purpose of showing title in the complainants by their bill. Harkins, et al. v. Pope, 10 Ala. Rep. 493. And it results from that, that any further proof of title is unnecessary.

2. As Pope leased of complainants, he was their tenant in the proper sense. But even in the action for use and occupation, a person holding under another cannot dispute the title of the latter. Fleming v. Gooding 10 Bing. Rep. 549; Cook v. Loxley, 5 T. Rep. 4; 2 Cam. 11.

3. Pope leased the entire property to Pearsall, admitting to him, at the same time, the rights of complainants—and the complainants who soon became aware of it, made no objection. Thus they sanctioned it, as the authorities cited by the chancellor show.

4. Equity does not permit Pope to make a private gain out of the trust interests. And this applies to the relation of landord and tenant, of partner & partner, &c. 1 Story's Com. on Eq. § 323, (2d edit.); Story on Partnership §'s 174, 175, 127, 129.

DARGAN, J.—The complainants allege that they are owners of an undivided third interest in a lot of land in the town of Florence, on which was situated a hotel, and that Willis Pope was the owner of the other two-thirds; one third in his own right, and the other in trust for the children of his wife. In the year 1840, complainants leased their third interest to Pope, for the sum of $333 33, at the expiration of which lease Pope leased the hotel, with another lot which he owned in fee, to one Pearsall for a term of years, for the sum of forty-five hundred dollars, which was paid by a conveyance of real estate to him, estimated at that sum. Afterwards the hotel was burned down, and the possession of the lot given up in consideration of seven hundred dollars, paid by Pope to the lessee. On the cancellation of the lease, Pope took possession of the lot, and the bill alleges, that he has sold the brick, not destroyed by the fire, and has rented out the lot ever since and received the entire profits.

The bill seeks an account of the rents and profits, and also a partition of the lot of ground.

The answer admits that Willis Pope was the owner of two-thirds of the lot, as stated, and also that he leased of the complainants, one-third for the year 1840, for the sum stated in the bill, but denies that the complainants are the owners of one-third, and alleges, that Pearson, who conveyed to them, was incapacitated from drink, to make the contract, and also that he had previously conveyed to another.

It is very clear that the agreement between the complainants and the defendant Pope, for the rent of the one-third interest of the land, established the relation of landlord and tenant between them. See 10 Ala. Rep. When that relation is once shown to exist, the tenant is estopped from denying the title of his landlord, and he cannot be permitted to set up an oustanding or adverse claim against him, when he sues either for rent, or for the recovery of the demised premises. Randolph v. Carleton, 8 Ala. Rep. 606; Jackson v. Stewart, 6 Johns. 34; Jackson v. Harper, 5 Wend. 246; 1 Cow. 575; 2 Bin. 468. He may, it is true, show that the landlord has assigned his title, and that he is therefore bound as tenant to the assignee; this, however, is not disputing the title of his landlord, but it shows that he holds under, and in accordance

with it, and that he owes rent to him who has the title, which he acknowledged. 6 Ala. 606; Jackson v. Davis, 5 Cowen, 123; 6 Wend. 666. So a tenant may show that the title of his landlord is extinguished, or has passed from him by operation of law. If the premises are sold by execution against the landlord, the tenant may show this in bar of the landlord's action for rent, for the purchaser occupies the same relation to the landlord that a grantee by deed would. But so long as the title remains in the same condition that it was, at the time the lease commenced, a tenant, who has recognised the title of his landlord by accepting the lease, cannot be permitted to gainsay his landlord's title by interposing the adverse claim of a stranger, which has never been asserted in any manner against the tenant. Pope, therefore, by accepting the lease or renting one-third of the premises from the complainants, became their tenant, and must account for the rents accordingly.

2. We think it equally clear that the complainants are entitled to participate in the profits realized by the lease to Pearsall. The complainants are the owners of one-third of the lot, and hold in common with the defendant Pope, who leased the whole premises as if he had been the sole owner. From this lease the complainants did not dissent, but by their bill allege, that they assented to it. It is two plain to admit of argument, that this act of leasing by Pope, did not enlarge his interest in the premises; but the complainants, assenting to the lease, were entited to their *pro rata* proportion of the rents. As the lease was cancelled on account of the hotel's being burned, and the defendant Pope, realised considerable profits from the contract, these profits are liable to distribution, in the same manner that the rents would have been, and each tenant in common is entitled to share in the profits, according to his interest in the land.

We can see no error in the decree, and it must be affirmed.

MARSTON *vs.* CARR.

1. It being made to appear to the Judge of the County Court, that his son is beneficially interested in a cause pending before him, he makes an order for its transfer to the Circuit Court, where the parties afterwards join issue and proceed to trial: *Held*—1. That the act of 1831 is a sufficient warrant for the transfer. 2. That the joinder in issue and going to trial in the Circuit Court is a waiver of objection. 3. Can the objection be made upon writ of error, or should not the party objecting have prayed a mandamus to rescind the order?—QUERE.
2. Where a plaintiff in garnishment, during the term at which the answer of the garnishee is filed, makes affidavit of its incorrectness, it is a sufficient initiation of the contest, provided for by the statute, without an issue being then formed.
3. In a contest between the creditor and garnishee of a debtor, if the garnishee voluntarily joins issue and goes to trial, it is a waiver of any previous irregularity in the proceedings.
4. An affidavit of the incorrectness of the answer of a garnishee is all that is necessary to the regularity of an issue in a contest between him and the creditor.
5. Where a garnishee answers that certain effects, which he admits are in his hands, are going to the debtor of the plaintiff or to the heirs of F., but that he is informed the debtor has no interest in them, except as the agent of the heirs of F., no judgment can be rendered upon the answer; but the heirs of F. should be summoned to contest with the plaintiff the fact of the garnishee's indebtedness.
6. In a contest between the creditor and garnishee of a debtor, the debtor is *prima facie* an incompetent witness for the garnishee.
7. The possession by a garnishee of promissory notes and title deeds to real estate, in which the debtor has an interest, will not authorise the rendition of a judgment against him.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

THE defendant in error made affidavit that William D. Primrose was indebted to him by judgment in the County Court of Mobile, in the sum of $2333, and that execution had issued and been returned no property, &c.; whereupon a summons of garnishment was served on the plaintiff in error, his alleged debtor, returnable to the February term 1846 of said court.—The garnishee at the same term filed his answer, in which he stated that he made an arrangement with said Primrose, by

which, for certain stipulated services, he agreed to allow the one third of the recovery that might be had in a law suit against one A. W. Gordon, which suit he subsequently compromised with said Gordon, and received from him the title to certain real estate in Mobile, and several promissory notes, and that he was ready and willing to account to whoever should be adjudged entitled to said one third of real estate and notes, but has been informed that said Primrose is not entitled to it in his own right, the services rendered at the time by him being rendered as the agent of the heirs of Favre, whose names he mentions. An issue was made up on this answer and tried by a jury, who returned a verdict in favor of the garnishee, but the verdict was set aside by the court, and being informed that the son of the judge was the assignee of the judgment against Primrose, the case was transfered to the Circuit Court of Mobile. At the fall term 1847 of the Circuit Court, the garnishee filed an additional answer by leave of the court, in which he states that he has been informed that said Primrose really has no interest in or claim upon the real estate and evidences of debt mentioned in his first answer, except as the agent or attorney of the heirs of Simon Favre, and that he is not aware that he is indebted to or has any effects or property of said Primrose in his hands, &c., except as above stated.— The additional answer admits the collection of three thousand dollars on the notes received in the compromise of the law suit, but insists that it was the understanding that the expenses attendant upon the suit were to be paid out of the first collections, that the garnishee has thus appropriated all but one or two hundred dollars of the amount collected, and that the expenses yet unpaid will require more than that balance to defray them. The plaintiff at the same term filed an affidavit denying the truth of this additional answer. The cause was continued until the spring term 1848, when a suggestion of the incorrectness of the answer was filed by the plaintiff, which the garnishee demurred to, and the demurrer was sustained. The garnishee then moved to be discharged, but his motion was overruled. An issue was then made up under the direction of the court, to try "whether or not the garnishee, Charles A. Marston, was indebted to the defendant in execution, William D. Primrose, at the time of the service of the summons

of garnishment." The garnishee in the course of the trial offered to introduce said Primrose as a witness, but the plaintiff objected, and the court excluded him. The plaintiff adduced evidence tending to show the incorrectness of the garnishee's answer, and the garnishee, other evidence conducing to establish its truth. Several charges were asked by the garnishee, which the court refused to give, the second of which was, that the jury could not under any circumstances give a verdict for a promissory note or notes, or the amount or value of a third part thereof, unless the same have been collected, nor for the value of real estate undisposed of. To the several rulings of the court, and its refusal to charge as requested, the garnishee excepted, and now assigns them as error.

BLOUNT & HAMILTON, for plaintiff in error:

1. The suggestion of the plaintiff in execution was filed long after the term of the court at which the contested answer was made, and under the decision of this court, should not have been allowed. 8 Ala. Rep. 811; 9 ib. 223; 12 ib. 615.

2. The proper mode of contest, if any error permitted, was not by an issue with the garnishee, but with the parties for whom it was alleged the judgment debtor, Primrose, was acting, and who appeared to be the real owners of the property in Marston's hands, to-wit, the Favres. 4 Ala. Rep. 385; 14 ib. 667; 2 ib. 177; 15 ib. 66.

3. Under the facts disclosed by the record, the judgment creditor has entirely mistaken his remedy: it is something other than a summons of garnishment. This court has ruled that judgment in process of garnishment follows only when there appears a subsisting debt or a money demand. 6 Porter, 365; 2 Ala. Rep. 526; 11 ib. 273; 1 ib. 421; 5 ib. 648; 15 ib. 183. No judgment, then, should have been rendered for the notes of James, in the hands of the garnishee, nor for the real estate in his possession. And for the same reason, the court erred in refusing to charge the jury that unless this property had been converted into money, the verdict should be for the defendant.

4. It is suggested that Primrose's testimony might well have been admitted. It is true, he is the defendant in the judgment, which the court says is within the spirit of the act

of Assembly, though not within the letter; but he was also the agent of the Favres. His principals have a right to his evidence, unless positively prohibited, and great injustice might be done them. The matter occurred before the passage of the act. 12 Ala. Rep. 592; 14 ib. 164-5; 9 ib. 744.

5. It is also submitted that the court erred in rendering judgment for interest against the garnishee. By the process of garnishment in this case, the money was stopped in the hands of the garnishee; he could pay to neither party in safety. 4 Mass. 170.

W. G. Jones, for defendant in error:

1. The son of the presiding Judge of the County Court being beneficially interested in the case, it was the duty of the Judge to transfer the case to the Circuit Court. Clay's Dig. 298 § 10.—2. The garnishee admits an indebtedness in effect to Primrose, at least to the extent of one-third of the money paid by Gordon to the garnishee. What he states in reference to the claim of the heirs of Favre, is not sufficient to prevent a judgment against him. Baker v. Moody, 1 Ala. Rep. 315; Mann v. Buford, 3 ib. 312.—3. The answer of the garnishee may be contested though it states that another person claims the debt. Wyatt v. Lockhart, et al. 9 Ala. 91; Foster, Nostrand & Co. v. Walker, 2 Ala. Rep. 177; Fortune v. The State Bank, 4 ib. 385; Moore v. Jones, 13 ib. 302.—4. A joinder in issue on the truth of the answer of the garnishee is a waiver of any previous irregularity. Hazard adm'r v. Franklin, 2 Ala. Rep. 349.

5. The second charge asked by the garnishee was properly refused, because it is too broad, and in the broad general terms in which it was asked, it is not law. There certainly were circumstances under which the garnishee would be liable for the amount of the notes refered to, though they had not been collected, and for the agreed value of the land refered to though it had not been sold; as for example, if the garnishee had agreed to take the notes or land as his own, and pay Primrose a specified sum of money for his share or interest in them. For aught that appears, this was the case here. If indebitatus assumpsit will lie, a garnishment will lie. Walker v. McGehee, 11 Ala. 273—it will

lie on an executed contract for lands. Butler v. Lee, 11 Ala. 885; Strickland v. Barns, 14 Ala. 511.

6. Primrose being defendant in execution, was incompetent to testify for Marston in this case, under the statute of 1845, as construed by this court. Brumby v. Langdon, 10 Ala Rep. 747; Carville v. Stout, 10 ib. 796; Scott, Slough & Co. v. Stalsworth, 12 ib. 25–28.

7. Interest was properly allowed against the garnishee under the circumstances of this case. He had contested the claim. The presumption is he used the money. There was no evidence that he had offered to pay it, or was ready to pay it, or had brought it into court. Under these circumstances he is chargeable with interest. Templeman v. Fauntleroy, 3 Rand. Rep. 434–446; Curd v. Letcher, 3 J. J. Mar. (cited in 1 Pirtle's Dig. 538, § 55;) Chase v. Manhart, 1 Bland Rep. 333; (cited in 2 Maryland Dig. 629, § 46;) Kirkman v. Vanlier, 7 Ala. Rep. 217.

COLLIER, C. J.—1. The Act of 1831, which authorises the Judge of a County Court, who is related to "any of the parties" to a suit pending in his court, to transfer the same to the Circuit Court of the county, we think is a sufficient warrant for the order of transfer in this cause. But if the order was made without a legal warrant, yet as it was acquiesced in, and a trial had in the Circuit Court, the objection of the garnishee comes too late: Besides, can the objection be made upon writ of error—should not the garnishee have prayed a rescission of the order by *mandamus?*

2. It is provided by the Act of 1833, that "the defendant may, in all cases, show by competent testimony, that a garnishee is indebted to him in a greater amount than he is willing to admit on oath:" *Further*, "the plaintiff wishing to controvert the garnishee's answer, may do so by making an oath, that he believes the same to be incorrect; whereupon, an issue shall be formed and tried as in other cases."—Clay's Dig. 60, §§ 24–25. In Graves v. Cooper, 8 Ala. Rep. 811, it was held to be irregular to permit the defendant, when his debtor is summoned as a garnishee, to contest the answer of the latter, unless this is done at the term of the court, when the answer is filed, or unless an order is then made, giving time for that

purpose. It has been decided in a subsequent case, that the sections of the statute which provide for the contestation of the garnishee's answer by the plaintiff or defendant, are not materially variant, and if the law be as we have stated it, when the answer is controverted by the defendant, it should be administered with the same strictness as applied to the plaintiff. The same reasoning applies with equal force to each. Lockhart v. Johnson, 9 Ala. Rep. 223; see also McDaniel v. Reed, 12 Ala. Rep. 615; Twelves & Co. v. Lodano, 15 ib. 732. The bill of exceptions distinctly affirms, that at the term at which the garnishee filed his amended answer, the plaintiff's attorney filed an affidavit of its incorrectness. This was a sufficient initiation of a contest as provided for by the statute, and the cases cited do not require that the issue shall be made up (if the affidavit is filed in time,) previous to the term when it is submitted to a jury for trial. The affidavit gives sufficient notice to the garnishee, prevents all surprise on his part, and the issue may be made up afterwards, under the direction of the court.

3. It appears that there was an issue, trial and verdict, upon the first answer, and that the verdict was set aside. Whether this answer was contested in due time, even if the objection could now be made, is wholly immaterial. By joining in the issue and voluntarily going into the trial, the regularity of the proceedings was conceded. So, that whether we have reference to the issue upon the first or second answer, the garnishee cannot object that the issue was not formed in proper time. The suggestion of the plaintiff found in the transcript affirms, that the garnishee had in his possession, at the service of the garnishment, "real estate, land, personal estate, goods, chattels, effects and property of other description of William D. Primrose, and was indebted in the sum of ten thousand dollars to the said William D. Primrose, which said property and sum of money was, and is, properly subject to the payment of his demands," &c. It is unimportant what disposition was made of the suggestion, whether it was sustained or adjudged bad on demurrer or motion to strike out; the judgment entry shows that the issue was framed so as to try the question of the garnishee's indebtedness, and this is quite sufficient. Both the affidavit and suggestion (if the latter be

necessary,) deny the truth of the garnishee's answer, and nothing more is essential to the regularity of the issue.

4. In Baker v. Moody 1 Ala. Rep. 315, the garnishee admitted that he had in his hands a certain sum of money received for the use of the defendant in the judgment; that the latter had stated in his (garnishee's) presence, the money was to go to D. D., but on what account garnishee did not know: *Held*, that it did not appear that D. D., had any title to the money, or that the defendant did not intend to pay it to him in discharge of a debt, and therefore, a judgment against the garnishee was correct. So it has been decided that a garnishee is not required to state the fact or validity of the assignment of a note he gave to the defendant; he may state that he has been notified by a third person that he is the assignee; and it then rests with the plaintiff to contest the fact of the assignment by an issue under the statute,—Foster, Nostrand & Co. v. Walker, 2 Ala. Rep. 177; see also Fortune v. The State Bank, 4 ib. 385, in which it was said, that if the plaintiff desired to proceed further against the garnishee, he should contest his answer and submit an issue to the jury: *Further*, the Act of 1840, "to amend the law in relation to garnishment" requires a notice to be given to a person, who is shown by the answer to set up a claim to the debt or property in respect to which the garnishment issued, by virtue of an assignment. (Clay's Digest, 63, § 40.) This statute being beneficial in its provisions should receive a liberal construction, and embrace not only a transfer by writing or orally, but apply to all cases where a third person is disclosed as the proprietor of the debt or demand. In Evans v. Norman, 14 Ala. Rep. 662, this construction of the Act of 1840, was reasserted, and it was decided that where a garnishee disclosed the name of a third person as the endorsee of a note, the proceeds of which he had collected, it was not competent to render a judgment against the garnishee, until the endorsee had been summoned or two notices had been returned "not found." The same liberal interpretation of the Act was maintained in Moore v. Jones, 13 Ala. Rep. 296, and it was added that within its spirit and meaning, one may be said to be the transferee of a debt, whom the garnishee states claims it as his own, and he is unable to determine whether such person or the plaintiff's deb-

tor is entitled to receive it. In the case at bar, the garnishee states that he has been informed that one-third of the property and money to which he refers in his answer, is going to Wm. D. Primrose, or the heirs of Simon Favre, whose name he discloses; that Primrose has no interest or claim in, or to the same, except as the agent of the heirs of Favre. Whether this information is true or false, garnishee cannot state. The garnishee is not aware that he is indebted to Primrose, or that he has any of his effects in his hands, or under his control. Here is no distinct admission of indebtedness to the defendant in the judgment, nor can it be predicated of the facts disclosed. True the defendant admits that he has in his possession some real property, promissory notes, and it may be a small sum of money; but he does not know that Primrose has any interest in it—in fact he has been informed that he has none, except as the agent of Favre's heirs. Upon this answer, it is clear that no judgment could be rendered against the garnishee. Within the equity of the statute of 1840, the heirs of Favre must be regarded as assignees, and should have been summoned to contest, with the plaintiff, the indebtedness of the garnishee. The cases cited are so conclusive upon the point that it is unnecessary to add more.

6. Primrose was, *prima facie* at least, an incompetent witness. The case of Scott, Slough & Co. v. Stallsworth, 12 Ala. Rep. 25, is decisive of this question, and is not in any manner affected by Dye v. Easley, 14 Ala. Rep. 158.

7. The second charge which the garnishee prayed was within the issue, appropriate to the facts, and should have been given. It merely asserted that if the garnishee had in his possession, promissory notes, or was the depository of the legal title to real estate, to the proceeds of both of which the defendant in the judgment would be entitled when realised, no judgment could be rendered against the garnishee for the collected notes, or the unsold land. See Smith v. Chapman & Brother, 6 Port. Rep. 365; Jones v. Norris 2 Ala. Rep. 526; Blair v. Rhodes, 5 ib. 648, and many other cases.

It can hardly be necessary to enquire whether the garnishee is chargeable with interest upon the sum, which the jury have affirmed he is indebted to the defendant in the judgment. Judging from the facts, we should think this question will not

be likely to arise upon a future trial; see, however, Kirkman, et al. v. Vanlier, 7 Ala. 217; Boyd v. Gilchrist, 15 Ala. 849.

We will not stop to consider the remaining charges prayed, as attention to the facts and points we have determined, will most probably prevent the same questions from being again raised. We have but to declare that the judgment must be reversed, and the cause remanded.

COPELAND *vs.* TOUCHSTONE.

1. If a third person contracts with a journeyman for the performance of work, without the name of his employer being disclosed, and, supposing him to be the party entitled to receive it, pays him therefor, he is discharged from all liability to the employer.

Error to the County Court of Mobile.

This suit was commenced in a Justice's Court, and taken by appeal to the County Court. The plaintiff having established his demand, the defendant proved as an offset an account for work done by one Richardson, who was a journeyman wheelright in the employment of defendant. The plaintiff in rebuttal proved that the contract for the work was made with Richardson alone, that plaintiff was not informed that he was in the employment of the defendant, and that he paid said Richardson for it as the work was done. Upon this state of facts, the cause was submitted to the decision of the court, and judgment was rendered allowing the defendant's offset.

This judgment is now assigned as error.

D. Smith, for plaintiff in error.

No counsel for defendant.

CHILTON, J.—It certainly cannot be assumed, that because the work was done at the shop of the defendant, he is entitled to recover for it. Copeland contracted with Richardson, in utter ignorance of the relation which existed between him and his employer, Touchstone. Conceding, then, that as

between the latter and Richardson, the relation of principal and agent obtained, or that Richardson was in the employment of Touchstone, who was entitled to all his earnings, it is too well settled now to be questioned, that if Copeland was ignorant of this fact—if he negotiated with Richardson as the principal, supposing him to be so, and paid him for the work before he had notice of any claim on the part of Touchstone, he will be protected in such payment.

Judge Story, in his work on Agency, p. 439, § 430, says—"The modes and circumstances under which such payments are made to the agent may have a material bearing on the rights of the principal. If the payments are received by the agent according to the ordinary course of business, or even if they are made out of the ordinary course of business, if the agent alone is known or is supposed to be the principal, the latter will be bound thereby. Mr. Pailey lays down the same doctrine. "If," says he, "the agent act for a principal *undisclosed*, he has authority to receive payment." Until the principal appears, the agent is to be regarded as the proprietor.—Liv. on Agency, 226—232; Faveric v. Bennett, 11 East. 38; Coates v. Lewis, 1 Camp. Rep. 444; Blackburn v. Schoales, 2 ib. 341; Stewart v. Aberdein, 4 Mees. & Welsb. 211; see also The Governor v. Dailey, 14 Ala. Rep. 469—472.

So, in the case before us, the party dealing with the journeyman, having no notice of the fact that he was working for the defendant in error, and having made to him full payment before he was informed by the defendant that he claimed the price of the work, must be considered as discharged from any obligation to pay the money over again to the principal.—Smith's Mercantile Law, 129.

It results from what we have said, that the County Court mistook the law in holding the plaintiff in error liable for the payment he had previously made to Richardson.

The judgment is consequently reversed, and the cause remanded.

HODGES *vs.* WHITE.

1. Where a garnishee answers, that he has executed a note to the trustee of a married woman for the hire of slaves conveyed to him by marriage contract between his *cestui que trust* and her husband—whether the marriage contract vests a separate estate in the wife or not—no judgment can be rendered against the garnishee as the debtor of the husband; but the trustee in such case must be brought before the court, in order that he may have an opportunity to defend his title to the note.

Error to the County Court of Barbour.

Buford, for the plaintiff.

Cochran & Sayre, contra.

DARGAN, J.—The plaintiff in error was summond as garnishee, to answer whether he was indebted to John P. Booth, against whom, White had obtained a judgment. The garnishee denied that he was indebted to Booth, the defendant in the judgment, or that he had any effects of his in his possession; but admitted, that before the service of the garnishment, he had hired of George C. Hodges, certain slaves for a term of years, and had executed his notes to him for the hire, as the trustee of Mrs. Booth, the wife of the defendant in the judgment. The answer further states, that at the time of the hiring, Hodges held the slaves by virtue of a marriage contract between John P. Booth and his wife, entered into before marriage, by which the slaves were conveyed to him for the sole and separate use of Mrs. Booth. A copy of the marriage contract was then produced, and the garnishee admitted that the slaves had been in the possession of Booth after the marriage.

The court, acting under the impression that the marriage contract did not vest the title of the slaves in Hodges, as trustee, for the sole use of Mrs. Booth, rendered judgment against the garnishee.

We think the court erred: No judgment can be rendered against a garnishee on his answer, unless it contain a clear

and direct admission of indebtedness from him to the defendant in attachment. Presnall v. Mabry, 3 Port. 105; Stubblefield v. Hagarty, 1 Ala. 38; Mims v. Parkman, et al. 1 ib. 526; Jones v. Norris, 2 ib. 524. The garnishee, by his answer, admits no indebtedness to Booth, and even if the marriage settlement was insufficent to vest the legal title of the slaves in Hodges, the trustee for *the sole use of Mrs. Booth*, yet as the notes are payable to the trustee, before the money can be condemned to satisfy the judgment against Booth, Hodges, to whom they are payable, should have been a party to the proceedings, in order that he might have an opportunity to defend his title to the notes. In the case of Covington & Reaves v. Kelly, 6 Ala. 860, we held, that where a trustee, appointed under a deed of trust for the benefit of creditors, has placed the choses in action, in the hands of an attorney, and the latter is garnisheed by a creditor of the grantor in the deed, no judgment can be rendered against him, until the trustee is brought before the court, and the deed of trust is declared invalid. This authority is conclusive to show that Hodges, the trustee, must be brought before the court, and his title adjudicated, before a sum of money, payable by note to him, can be condemned to satisfy the debt of another.

We decline to express any opinion on the sufficiency of the deed to settle the property on Mrs. Booth, for her separate use, as it is not necessary to the decision of the cause.

Let the judgment be reversed, and the cause remanded.

WHITLOCK *vs.* HEARD.

1. Where W. loses at gaming the note of H., given for W.'s accommodation, and the winner loses it in the same way to M. & S., or transfers it to them in discharge of a gambling debt, M. & S., not being *bona fide* holders, cannot by an arrangement between themselves, confer upon the note a validity which it did not previously possess.

Error to the Circuit Court of Cherokee. Tried before the Hon. Sidney C. Posey.

This was an action of trover, in which the plaintiff sought to recover damages of the defendant in error for the conversion by him of several horses. The evidence conduced to show that the plaintiff for his own accommodation and benefit received from the defendant, the note of the latter for two hundred dollars, and left with the defendant the horses in question as a security or indemnity against it. On the night of the day upon which the note was received from the defendant, the plaintiff lost it at a game of faro, of which fact the defendant was notified and warned not to pay it to any person. The individual who won the note from the plaintiff soon afterwards lost it at gaming with Martin and Stypes, or transfered it to them in discharge of a gaming debt, to whom, after he had been notified by the plaintiff as above stated, the defendant gave a new note in lieu of the one he had given to plaintiff. After the note came to the possession of Martin and Stypes, by an agreement between them, Martin transfered his interest in it to Stypes, in consideration of a debt due from the former to the latter, and of the latter's interest in their joint winnings. There was proof of a demand and refusal, &c.

The court charged the jury, that if after the note had been lost by the plaintiff at gaming, it came into the hands of Martin & Stypes, and Martin transfered it to Stypes in payment of a just debt, and of Stypes' share of their joint winnings, the defendant was justified in paying Stypes, and the pledge of the horses would be sustained by the indebtedness of plaintiff to defendant, growing out of the payment of the note. To this, and other charges, which it is unnecessary to notice, the plaintiff excepted and now assigns them as error.

Rice & Morgan, for plaintiff.

L. E. Parsons, for defendant.

CHILTON, J.—The first charge given by the Circuit Court cannot be supported. It assumes that the two hundred dollar note, borrowed from Heard by Whitlock, and lost by the latter at faro, continues a lien upon the stock sued for, because the faro dealer, who won it from Whitlock, transfered it to Martin & Stypes, who won it from him, or received it in

payment of a gambling debt, and who agreed that Stypes should take the entire interest in consideration of their joint winning and in payment of a debt due from Martin to Stypes. The note having been made by Heard for the accommodation of Whitlock, as between them, it was wholly without consideration. In the hands of Whitlock, before it was negotiated, it was no more than waste paper. It must then depend for its binding efficacy upon a valid negotiation. The losing it upon a game of faro, and the winning it by Martin & Stypes, is not such a negotiation as gives it vitality in their hands, and Martin & Stypes not being *bona fide* holders for value, cannot by any arrangement between themselves, confer upon the instrument a binding obligation which it did not previously possess. See Saltmarsh v. Tuthill, 13 Ala. Rep. 390; The same v. Plant. & Merc. Bank, 14 ib. 668–679; same v. Hill, at the present term. Had Heard, before notice by Whitlock, that he had lost the note at gaming, and a request not to pay it, paid the note, then he would be protected, as he should not suffer by the negligence or default of Whitlock. But if after he received such notice, he made the payment, or renewed the note, the lien which he held upon the stock for the satisfaction of the note, is extinguished so far as the note is concerned. If, however, the note was renewed before notice, and the renewed note is outstanding against Heard, he would not be bound to let go his hold upon his lien, until indemnified against the cost and expense of defending against it.

These views, with the opinions expressed in this *batch* of cases which for several terms have appeared upon the docket of this court, will, we trust, enable the Circuit Court properly to put an end to this litigation in the court below. See Whitlock v. Heard, 13 Ala. Rep. 776; same v. Stewart, ib. 790; same v. Stewart, et al. 15 ib. 601.

Let the judgment be reversed, and the cause remanded.

POWE & SMITH *v.* STERRETT, JUDGE, &c.

1. Since the passage of the act of 1843, where a judgment is rendered against an administrator, within eighteen months from grant of administration, and execution is returned no property, it is a good defence to an action thereon against him, suggesting a *devastavit*, that, after the rendition of such judgment, the estate was regularly declared insolvent.

Error to the Circuit Court of Wilcox. Tried before the Hon. Geo. W. Stone.

THIS was an action of debt instituted by the defendant in error, for the use of Robert N. Murphy, against the plaintiffs in error, on a bond executed by them as administrator and administratrix of the estate of Archibold K. Smith—suggesting a *devastavit*. It appears from the record, that a suit was pending against the intestate at the time of his death, in favor of said Murphy, which was revived against the plaintiffs in error as his personal representatives, and judgment obtained therein within eighteen months after grant of administration, and upon which execution issued and was returned no property; and that after the rendition of this judgment the estate was declared insolvent. Upon this state of facts, the defendants below requested the court to charge the jury that the said declaration of insolvency related back to the death of the intestate, and that if they believed the proof, the plaintiff could not recover. This charge the court refused to give, whereupon the defendants excepted, and now assign it as error.

SELLERS, for plaintiffs in error:

It is insisted by the plaintiffs in error, that the Circuit Court should have given the charge asked. The declaration of insolvency of the estate of A. K. Smith, the plaintiff's intestate, related back to his death. 1 Brayton (Verm.) 133; 2 U. S. Dig. 546. If this is not so, what possible defence at law could administrators interpose to protect themselves against personal liabilities? The administrators could not have interposed the plea of *plene administravit*, although their securities, when sued, might. The plea of *plene administravit* cannot be interposed

by administrators in this State under any circumstances; and the common law is wholly inapplicable in this State upon that subject.

The judgment, when obtained against the administrators, operated only to ascertain or liquidate the demand, and the subsequent declaration of insolvency estopped the plaintiff thereafter from further prosecuting his judgment, and the law then referred him with his judgment to the Orphans' Court for his rateable distribution of the assets of said estate.

I am aware that this court has decided seemingly different from the views above expressed, in the case of Garrow v. Emanuel, 3 Stew. Rep. 285; but upon looking into that case, it will be seen that the facts governing it and those involved in this case are materially different.

Watts & Jackson, for defendant in error:

1. The bill of exceptions does not profess to show all the testimony before the court and jury; yet the charge asked is, "If the jury believe the testimony, they cannot find for the plaintiff below." This court cannot undertake to say whether there was error in refusing the charge, without knowing what was the whole proof. The bill of exceptions is to be taken most strongly against the party excepting; all presumptions are indulged in favor of the inferior tribunal. Holmes v. Gayle and Bower, 1 Ala. Rep. 517; Stone v. Stone, 1 ib. 582; Knapp v. McBryde and Norman, 7 ib. 19; Mallory v. Stodder, 6 ib. 801; Castles v. McMath, 1 ib. 326.

2. But upon the testimony shown by the bill of exceptions, the court might well have refused the charge—1st. Because the court is asked to charge directly on the facts—Huff v. Cox et al. 2 Ala. 210. 2d. Because the rendition of the judgment against the administrator as such, and a return of "no property found" on the execution, fixed a *devastavit* on them to the extent of the judgment—Garrow v. Emanuel, 3 St. 285; Thompson v. Searcy and Fearne, 6 Port. 393. The case of Garrow v. Emanuel (3 Stewart) has never been overruled; this decision was made in view of the statutes before the one of 1843. This last statute has not altered the *amount* of proof required by the plaintiff to show a *devastavit* as administrator.

COLLIER, C. J.—In Garrow v. Emanuel, 3 Stew. 285, it was decided that a judgment by default against an executor, and return of execution 'no property found,' are conclusive evidence of a *devastavit* to the amount of the judgment, in a second action by the same plaintiff against him, in his individual character, suggesting a *devastavit: Further*, that the executor cannot in such second action plead the insolvency of his testator's estate under statute—his personal liability being fixed by the judgment in the the first suit. This case certainly laid down a most stringent rule in its last proposition, even under the legislation as it existed at the time it was decided. An executor or administrator was then sueable "after the expiration of six months from the time of proving the will of the testator, or of granting letters of administration on the estate of the deceased." This time was prescribed "to the end that the executor or administrator may have an opportunity to ascertain the situation of the estate of the testator or intestate."—Clay's Dig. 192, § 2. The act of 1815 enacts that all claims against the estates of deceased persons, which are not presented to the executor or administrator within eighteen months after the same shall have accrued, or within eighteen months after letters testamentary or of administration, shall be forever barred: *Provided*, that this limitation shall not extend to persons under age, &c.—Cl. Dig. 195, § 17. Under the decision refered to and the statutes we have cited, an administrator might be sued, and in an ordinary case a judgment recovered and enforced against him previous to the expiration of the time limited for the presentation of claims against the estate, though claims might be subsequently presented within the bar, which manifested the insolvency. The only means of preventing irreparable injury to the administrator in such case, would be to allow him to retain a sufficient amount of the assets to indemnify himself, notwithstanding he had reported the estate insolvent. But where the judgment remains unsatisfied, when the report is made and confirmed, if he cannot plead the insolvency, he must be personally charged, or if the estate is liable to him, the judgment creditor who has most promptly put his claim in suit will be paid *in toto*, to the prejudice of others equally meritorious. We will not stop to consider whether the case cited was consonant to our statutes upon the subject, or whether

the consequences resulting from it should not have induced a different decision.

By the eighth section of the act of 1843, it is enacted that "Whenever any administrator *de bonis non* shall be appointed, according to the provisions of this act, any former grant of letters testamentary or of administration of the said estate shall be thereby revoked; and all the goods, chattels, moneys, choses in action, and other personal effects, belonging to the said estate, shall be thereby vested in such administrator *de bonis non;* and he shall be entitled to demand and receive from the former executor or administrator all moneys found due and owing from him to the estate, and all such goods, chattels, choses in action, and other personal effects, and deeds, and other evidences of title to real estate, and may recover the same by any proper proceedings or actions, either in the Orphans' Court or any court of common law or equity, against such former executor or administrator and his securities."—Clay's Dig. 194, § 9. This provision, it will be seen upon the decree of insolvency and the appointment of the administrator *de bonis non*, divests the title of the previous representative of the estate; and any further intermeddling with the estate, except for conservative purposes, makes him an executor *de son tort*. See Hearrin, adm'r, v. Savage, adm'r, at this term. The effect of the decree of insolvency, it has been held, is to transfer to the Orphans' Court the entire jurisdiction of all claims against the estate; with a few exceptions, all debts are placed on the same footing, though the estate be solvent, and where it is insolvent, the fund for distribution is to be equally divided amongst all the creditors who are not thus privileged. Edwards v. Gibbs, 11 Ala. Rep. 292.

The administrator, being divested of the assets by due course of law, cannot be charged with the payment of the judgment; and the only question is, in what *forum* shall he seek relief—whether in equity or at law. Even if *secundum stricti juris*, the administrator could be charged upon the suggestion of a *devastavit*, there can be no question but equity would interpose and releive him. Having delivered over the assets to his successor as the statute required, we think the common law inference from the recovery of the judgment and the return of "no property found," is entirely repelled, and the defence may

be made in a court of law. This conclusion seems to us to result from the controling efficacy of the statue, which, conceding that *Emanuel v. Garrow*, was a correct exposition of the law when made, supersedes and annuls it, so far as it is in conflict with the present case.

The judgment is reversed, and the cause remanded.

McDANIEL *vs.* WHITMAN, GUARDIAN, &c.

1. Where the late husband of a deceased wife propounds his interest and moves the Orphans' Court for a decree against her guardian for a sum of money in his hands, which belonged to his ward, a denial of the motion is such a final order as will support a writ of error.
2. Money of a female ward in the hands of her guardian must be considered as in her possession, and, as upon marriage the legal existence of the wife is merged in that of the husband, the possession is by operation of law transferred to him, and his marital rights thereupon immediately attach.

Error to the Orphans' Court of Perry.

THE defendant in error as guardian of Nancy Cross, received from the clerk of the Orphans' Court of Perry a sum of money as the distributive share of the estate of his ward's mother. The ward intermarried with the plaintiff in error, McDaniel, and died before she arrived at the age of twenty-one, and without any thing being done to reduce the money in the guardian's hands to the *actual* possession of the husband. After the death of the ward, the guardian was called to a settlement in the Orphhns' Court, when the plaintiff in error moved the court for a decree in his favor against the guardian for said sum of money. The court denied the motion, and ordered that *scire facias* issue to the legal representatives of the said Nancy, when known, and that the settlement of said account be continued. This judgment is now assigned as error.

GARROTT, for plaintiff:

1. A writ of error lies in this case—Clay's Digest, 297, § 4; Harrison, et al. *ex parte*, 7 Ala. Rep. 736.

2. The possession of the money by the guardian was the possession of the ward, and on her marriage with McDaniel, this possession became in law, the husband's possession.—Magee v. Toland, 8 Porter, 36.

3. As the right to the money was thus vested in the husband, and as the Orphans' Court had jurisdiction of the fund, McDaniel was a proper party to the proceedings before the Orphans' Court, and a decree should have been rendered in his favor. Ex'rs of Sankey v. heirs of Sankey, 6 Ala. Rep. 607, where a decree was rendered in favor of the administrator of a deceased wife, the property not having been reduced to possession by the husband.

4. As all the facts necessary to an ascertainment of the rights of the parties appear in the record, and are uncontroverted, the plaintiff in error submits that he is entitled to have a decree in this court, for the amount due to him from the defendant in error.

No counsel for defendant.

CHILTON, J.—The judgment of the Orphans' Court, which determines that the plaintiff in error shall take nothing by his motion, made upon the propounding of his interest as the husband of Nancy, who was the ward of Whitman, we must regard as a final order, from which a writ of error will lie. It is certainly conclusive upon the rights of the husband, and decisive of his claim to the monies due, in right of his wife, from the defendant in error. The statute authorises an appeal or writ of error to the Circuit or Supreme Court, from any judgment or order final made by the County or Orphans' Court, whether in vacation or term time—Clay's Digest, 297 § 4, and we think the case at bar comes within both its letter and spirit.

The only question raised by the record is—is the husband entitled to monies in the hands of the guardian of the wife after her death, which he had never recovered or had in his *actual* possession during the existence of the coverture? According to repeated decisions of this court, the husband is not

entitled to the wife's choses in action, unless he reduces them to possession dnring the coverture; nor can he by administering upon her estate, after her decease, entitle himself to them, but they go to her distributees. Bibb v. McKinley, et al. 9 Porter, 636, and authorities cited.

It was, however, decided by this court, some ten years since, that the possession of personal property by the wife's guardian, must be considered the possession of the wife, and as upon the marriage of the ward, her legal existence becomes merged in that of her husband, the possession by *operation of law* is *eo instanti* transfered to the husband, and requires no further act on his part, to vest his marital rights—McGehee v. Toland, 8 Porter, 30. True, that case involved a controversy in respect to a slave, which had gone into the guardian's possession, but I can see no difference, so far as respects the application of the rule, between one description of personal property and another. The constructive possession of the husband, by virtue of which his marital rights attach, arises out of the relation in which the guardian stands toward him, as well in respect to the money, which the guardian has received, as to the slave. As to both, the possession of the guardian must be regarded as the husband's possession, and upon the final settlement of the account, the husband, who has survived his wife, must be considered as the person entitled. See the cases refered to in McGehee v. Toland, *supra,* and also Miller v. Bingham, 1 Iredell's Eq. Rep. 423; Bates v. Dandy, 2 Atk. Rep. 207; Jarman v. Wollatten, 3 Term. 620.

The judgment is consequently reversed, and the cause remanded.

WHITE *vs.* NANCE.

1. The plaintiff in an action of ejectment or trespass to try title may dismiss the suit whenever he thinks proper, and the fact that the beneficial interest in such suit is in another cannot affect his right to do so.
2. If a plaintiff desires to dismiss his suit, but the court notwithstanding

proceeds to a trial, whereby the same result is attained that would have been effected by the dismissal, no injury is done to the plaintiff, and the judgment consequently will not be reversed.

Error to the Circuit Court of Dallas. Tried before the Hon. Nathan Cook.

G. W. GAYLE, for plaintiff:

1. Independent of the facts stated to the court by plaintiff's counsel, the proof abundantly shows that Thomas White, the patentee, was a mere *nominal* plaintiff. It is not necessary that the record should disclose the party in interest, unless called to indemnify the nominal plaintiff for costs. Brazier v, Tarver, 4 Ala. 569.

2. The *nominal* plaintiff, White, could not dismiss the suit, because he had given *no notice* to indemnify against the costs. Brazier v. Tarver, 4 Ala. 569.

3. White being the nominal plaintiff, his declarations, after suit, were inadmissible for any purpose. 9 Ala 791.

4. As EVIDENCE, the declarations of White proved nothing, because a legal title to land can only be shown to be *parted with* BY DEED. Again: if White had sold the land, his *deed* is the best evidence, and its absence is not accounted for. The declarations were used as evidence. Morgan v. Patrick, et al. 7 Ala. 185.

5. But if White were the *real plaintiff*, his declarations, (proven by defendant) that he had sold the land to another, could not outweigh the evidence of title in himself shown by the *patent*. The court should therefore have charged that the plaintiff was entitled to recover under the evidence. Morgan v. Patrick, et al. 7 Ala. *supra*.

LAPSLEY, contra.

DARGAN, J.—This is an action of trespass to try titles, and recover possession of a tract of land, brought in the name of the plaintiff against the defendant. As evidence of title, a patent was introduced, from which it appears that the land in controversy, was granted by the government to the plaintiff. The defendant then offered in evidence, an instrument in writing, signed by the plaintiff, in which he acknowledged that he had no title to the land, as he had conveyed it before the suit

was brought, and in which he agreed that the suit should be dismissed. The counsel for the plaintiff objected to this instrument as evidence, which objection was overruled. The counsel who appeared for the plaintiff, then stated that the suit was brought without the knowledge of the plaintiff, under the instruction of one Strickland, whose wife claimed to be entitled to dower in the land, but owing to some defect in the title, or loss of the deed, executed to the person through whom she claimed dower, her title could not be made out, and that this suit was brought for her benefit, and to enable her to recover.

The court was requested to charge the jury, that the evidence offered by the defendant was insufficient to show title in another, and that the plaintiff was entitled to recover. This charge the court refused to give, and instructed the jury that the evidence introduced by the defendant conduced to show that the plaintiff had no title. Under this instruction, the jury returned a verdict for the defendant.

We will not enter into an examination of the propriety of the charge given by the court to the jury, for we are satisfied that under the circumstances, the court should have dismissed the suit, and as the suit is trespass to try titles, the same result is produced by the verdict as the dismissal of the suit would have had. If the suit had been dismissed, the defendant would have recovered cost, and the only effect of the judgment rendered on the verdict is, that it entitles the defendant to his cost. It is true, a suit at law may be carried on by one who is beneficially entitled to the money, in the name of him in whom is vested the legal title. Brazier v. Tarver, 4 Ala. 569—and a court of law will protect the rights of him beneficially interested, and will not permit the plaintiff to dismiss the suit, if the party entitled to the proceeds of the recovery will indemnify him against the cost to which he may be subjected. But the suits that may be thus prosecuted are those brought to recover a sum of money, and *perhaps for a specific chattel*, where the title is in one, but the beneficial interest is in another. In ejectment or trespass, to try title to land, we can look alone to the legal title, and no person can control the suit, except the plaintiff, even if another has an equitable interest in it. The plaintiff in this case had the right to control the suit as he saw

proper. Neither the counsel, nor those at whose instance he brought the suit, could prevent him from exercising this right. He desired to dismiss the suit, but it has been tried, and the trial has produced no other result than would have been produced had the suit been dismissed. He has then suffered no injury from the ruling of the court, and the judgment must be affirmed.

DRIVER, Adm'r, *vs.* HUDSPETH.

1. To authorise the vendee of real estate, who holds the bond of the deceased vendor, to proceed in the Orphans' Court to compel the personal representative to make him a title, it is necessary that the petition should disclose that the deceased was the owner of the land at the time of his death.
2. In proceedings on a petition by the vendee of real estate to compel the personal representative of a deceased vendor to make him a title, the Orphans' Court has no power to impannel a jury, unless a real doubt arises as to some disputed fact; and in such case the testimony showing the necessity for so doing must be spread upon the record.
3. A vendor of land, who has executed his bond, conditioned to make title upon the payment of the purchase money, has a lien on the land until such payment is made, and the vendee must show that he has an equitable right to the land, freed from such lien, before the Orphans Court can decree that the legal title be conveyed to him by the personal representative of the vendor. Such a lien is regarded in the nature of a mortgage, and the fact that the notes given for the purchase money are barred by the statute of limitations does not destroy it.
4. A receipt for money is only *prima facie*, not conclusive evidence of the fact recited in it, and may be contradicted by oral testimony.

Error to the Orphans' Court of Chambers county.

Allison & Andrews, for plaintiff:

1. The petition is insufficient—it should have alleged the title to have been in Vann, at the time of his decease; such a state of facts should be stated as will bring the party within the statute; therefore it is necessary to state the title to have

been in the deceased vendor to give the court jurisdiction. Clay's Digest, 157 § 38; Simpson v. Simpson, Minor Rep. 33; Crim's adm'r v. Townsend, 9 Ala. 403.

2. The submitting the cause to the determination of a jury in this case was error. Willis' adm'r v. Willis' heirs, 9 Ala. Rep. 330; Brazeal's adm'r v. Brazeal's distributees, 9 Ala. Rep. 496; Reynolds' adm'r v. Reynolds' distributees, 11 Ala. Rep. 1027.

3. The charge asked of the court should have been given: 1st. Because the statute of six years (if it applied in this case) is only a bar to a recovery on the notes but *is not an extinguishment* of the demand. 2d. The payment of the purchase money was secured by a condition precedent, contained in the bond for titles, which could not be affected by the statute of limitation until all remedy would be lost on the bond. See in support of the first proposition, 1 Ala. Rep. 744, in the case Duval's heirs v. McLosky.

4. The charge given was erroneous, because the receipt was liable to explanation, and would have been only *prima facie* evidence of payment, had its execution been proved, and may be explained by parol. Gayle v. Randal, 1 Stewart Rep. 529; Kirksey v. Bates, 1 Ala. Rep. 303.

No counsel for the defendant.

CHILTON, J.—The petition in this case avers that Hudspeth, the petitioner, purchased the land from Vann, and received his title bond by which Vann covenanted to make title when the purchase money was paid, or when he should procure a patent from the United States. It is wanting in one essential averment, to wit, that Vann was the owner of the land, to which the party prays the court to order the administrator to make title. The act provides that "when any person *owning* lands or tenements, shall sell the same, and enter into bond to make titles," &c.—Clay's Digest, 157, § 38. This statute confers upon the Orphans' Court, a limited and special jurisdiction, and marks out the course to be pursued, and no one can successfully invoke this extraordinary remedy, unless he brings himself within the category for which provision is made. The Orphans' Court has not, like the Court of

Chancery, the power, when the title is not in the obligor in the bond, to bring before it those holding the legal title, so as to decree a divestiture of their title, and vest the same in the purchaser. It can only act upon a case which comes within the terms of the enactment, and as to cases not provided for, the parties must resort to chancery. Minor's Rep. 33; 9 Ala. Rep. 403. We should not however, reverse the cause upon this ground, inasmuch as the counsel, though they have argued it, have not assigned the ruling of the court upon the sufficiency of the petition as error. We proceed, however, to remark, that in the matter of the bill of exceptions which is assigned for error, the Orphans' Court Judge clearly misconceived the law. The statute, under which this proceeding has been instituted, was passed in 1812, before the Orphans' Court had power to summon a jury to try questions of fact, and seems by its terms to contemplate that the judge shall investigate the facts of the petition, and "if he shall find the contract was fairly made" &c., order the administrator to convey. But conceding that by the act of 1821, (Clay's Digest, 303 § 32,) the court has the power to summon a jury in cases of this kind, still the necessity of its exercise must, according to the previous adjudications of this court, affirmatively appear of record. In Willis' adm'r v. The heirs of Willis, 9 Ala. Rep. 330, it was said, "the statutes do not justify the Judge of the Orphans' Court in declining, or refusing to decide any question of fact which may arise, unless a real doubt exists as to the existence of the fact." The practice to be pursued by the Orphans' Court when a jury is impanelled, in cases not specially provided for, is sufficiently pointed out in the case last refered to, and requires no further comment.—See also Reynolds' adm'r v. Reynolds' distributees, 11 Ala. Rep. 1023. The record before us shows no reason why the aid of a jury was called in, and the judgment upon their verdict is erroneous.

It will be unnecessary to notice the charges given to the jury, further than to remark that the statute evidently contemplates that the purchaser must have paid for the land, the title to which he prays may be decreed him, unless the bond otherwise provide, before the court can pass the decree that the administrator convey. True, the statute is general in its terms, and says nothing about the purchase money, but it is clear

the Legislature did not intend to divest the estate of the deceased vendor of the equitable lien which attached for the purchase money. We are of the opinion that the petitioner must show that he has an equitable right to the land, freed from such lien, before the court should decree that the legal title be conveyed to him. If then, in this case, the bond provided for the payment of the money, before the vendor was compellable to make title, and any of the notes executed in consideration of the sale remain unpaid, the court should have refused the order which was prayed for. The fact that the notes were barred by the statute of limitations does not destroy the lien, which is regarded in the nature of a mortgage. If the vendor, whose notes are barred, or his heirs after his death, should bring ejectment to recover the land, and thus drive the purchaser into a court of equity to enjoin the action, it is very clear to my mind that the court of chancery would not interfere until he had paid up the purchase money, the remedy to recover which, at law, had been barred by the statute of limitations. The court of equity would not decree a specific performance in favor of one who withholds the compensation he stipulated to pay, upon the ground that the legal remedy to recover it is barred. The vendor is not bound to sue upon his note, but may rest upon the security furnished by his lien—such is the doctrine fairly deducible from the decision of Doe, *ex dem.* Duval's heirs v. McLoskey, 1 Ala. Rep. 708–744.

As to the receipt of payment endorsed on the bond, it is *prima facie* evidence of the fact, but not conclusive, and the fact of payment which it recites may be contradicted by oral testimony. 1 Greenl. Ev. 446, § 305; 1 Stew. 529; 1 Ala. Rep. 303.

It results from what we have said, that there is error in the proceedings, and the decree is consequently reversed, and the cause remanded.

RUST ET AL. *vs.* PAINE.

1. The bond of a debtor, conditioned for his appearance before two justices to take the benefit of the act for the releif of insolvent debtors, is not forfeited, if, after ten days' notice to the creditor, he appears at the time and place appointed, with the intention of complying with its condition, but is prevented from doing so by the failure of one of the justices to attend.
2. The transfer of property by a debtor, after his arrest and the execution of a bond to take the benefit of the act for the releif of insolvent debtors, does not constitute such a breach of the condition of the bond as can be inquired into in an action on it against the debtor and his security.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

DEBT on bond by defendant against plaintiffs in error, commenced in a justice's court and taken by appeal to the Circuit Court of Mobile. The bond sued on was executed on the 10th March 1846, and, after reciting that the plaintiff in error, Rust, had been arrested by a constable under a *capias ad satisfaciendum*, and that he had applied to J. A. Roberts and S. T. Douglass, two justices of the peace, for the benefit of an act entitled "an act amendatory to the laws now in force for the releif of insolvent debtors," who had appointed the 9th day of May 1846, at the hour of 12 o'clock, at the office of said Roberts, to hear the application, is conditioned, "that if the said Rust shall well and personally appear and make surrender in such manner as is required by law of his property and effects, for the benefit of his creditors, at the time and place above appointed, then this obligation to be void," &c. The evidence tended to show that a few days after the execution of the bond, the defendant in error was informed of it and had notice of the time and place appointed to hear the application. It was proven that Rust appeared at the time and place appointed, but of the two justices Roberts alone was present, who, without any schedule of property and effects being rendered by Rust, administered to him the oath, "that the particular grounds upon which he was arrested were untrue, and that he had nei-

ther moneys, estate or effects wherefrom to satisfy said debt, or liable for the same," and thereupon discharged him. The defendant in error was not present. There was evidence conducing to show a transfer of property after the bond was given, and before his appearance at Roberts' office. The court charged the jury that the oath which Rust took would not discharge him and his security from their liability on the bond.

The defendants' counsel asked the court to charge the jury "that if Rust appeared at the time and place specified in the bond for his appearance to take the benefit of the insolvent laws, to be heard, and was then and there discharged by the magistrate, even if the discharge was fraudulent, the discharge released the security from his liability on the bond," which charge the court refused to give, stating that it was abstract and not warranted by the evidence, and then instructed the jury "that if the oath which Rust took had been the oath which the law requires, he would not have been discharged legally, because he was discharged by one magistrate, when the law requires two—therefore the plaintiff had a right of action both against Rust and his security."

To the charges given and to the refusal to charge as asked, the defendants excepted, and now assign them as error.

Campbell, for plaintiffs in error:

1. The attendance of Rust for the purpose of complying with the conditions of the bond executed by him, and his compliance being defeated only by the non-attendance of the magistrate, discharge him and his securities from the forfeiture of the bond. 3 Ala. Rep. 404; 7 ib. 104.

2. The attendance of Rust for the purpose of complying with the conditions of his bond, and the oath taken by him before Joel A. Roberts, was a compliance with the conditions of the bond, and is a discharge to him and his sureties. The State v. Love, 4 Ired. 434.

3. The statement of the plaintiff is defective, and the demurrer should have been sustained. The statement does not purport to be founded on the bond, but simply declares for the money due on it. The amount due is not set out *in numero*, as is required in an action of debt. There is no description

of the bond by the date—the amount of the condition—the nature of the condition. The legal conclusion of the party as to the nature of the bond is set out in the statement, without a statement of the facts.

RAPIER, for defendant:

1. The charge given by the court touching the insufficiency of the oath made by Rust, the principal in the bond, to discharge him and his surety, was correct. Such an oath was not a compliance with the condition of the bond, nor could it operate as a release of principal or surety. 8 Ala. 288.

2. The charge asked by the defendant's counsel was correctly refused, for although a fraudulent discharge might, in our view of it, release a surety, yet in this case the principle could not apply, for here there was no discharge whatever.—The proceeding was, as it were, *coram non judice.*

3. The charge to the jury, as last set forth in the bill of exceptions, that a discharge given by one justice of the peace was insufficient, when the law required two, was not error; and though it were abstractly incorrect, it would not be a ground for reversal, because it did not prejudice the cause of the defendant.

COLLIER, C. J.—The Act of 1821 enacts that when any person, who may be taken on mesne process, or be charged in execution, shall desire to deliver up his property for the benefit of his creditors, in order to be discharged from arrest or execution, he shall enter into bond with surety, for the amount for which he shall be taken in custody or charged in execution, to the sheriff, &c., conditioned that he will appear and make surrender, in such manner as is required by law, of his property or effects for the benefit of his creditors, at such time and place as may be designated by the judge or two justices of the county, where such person may make his or her application: *Further*, the applicant, coming before the judge or justices at the time and place appointed, shall subscribe and deliver in a schedule of his whole estate, and make oath to the effect of that now required by law, in relation to insolvent debtors, with the exception of such articles as are or hereafter by law may be reserved to every family, or be exempted by

law from seizure or execution. Whereupon such debtor shall be discharged by warrant from the judge or justices, to whom the application may be made. The act also provides that the debtor's bond shall be assigned to the plaintiff, and if it should be forfeited, the sheriff or other officer taking the same shall, within ten days thereafter, return it to the clerk's office of the county from which the mesne process or execution issued, or to the justice of the peace who issued such process or execution, with an endorsement on the bond that the same is forfeited. Clay's Dig. 275, 277, §§ 9, 10, 14. The previous enactment of 1807 requires that ten days' notice shall be given to the plaintiff at whose suit the debtor, desiring to be discharged, shall be in custody, prescribes the oath to be taken, and the manner in which the schedule shall be made and subscribed. Clay's Dig. 272, § 2.

In Davis' Ex'rs v. Cathey, 1 Stew. Rep. 402, it was decided that the fraud of the debtor, in not rendering a true schedule of his property to the judge before whom he took the oath of insolvency, and obtaining a discharge under the act of 1821, cannot subject his security to suit upon the bond, when the latter had no agency in the fraud. Bridges v. Hobson, 3 Ala. R. 404, was an action against the surety of a party who had entered into bond to appear before two justices of the peace to take the oath of insolvency under the act of 1821; the defence relied on was, that at the time appointed the principal obligor offered to take the oath and render a schedule of his property. This court said, "The notice being sufficient, the principal obligor offering to perform the condition of the bond was in law a performance. It was not in the power of the debtor to compel the justices to act, to administer the oath and receive his schedule. This is not like the case of one who covenants that another shall do a particular act; in that case, he cannot say that he had no control over the action of such person, as an excuse for its non-performance, but is bound to procure the act to be done. In this case, a benefit is by law conferred on the debtor, provided he does certain acts, the performance of which cannot be effectual without the concurrence of the two justices of the peace. Now, as it is not in his power to control the action of the magistrates, an offer to perform must in

law be a performance, at least so far as to prevent a breach of the condition of his bond."

In Anderson v. Rhea, 7 Ala. Rep. 104, it was conceded that the returns of sheriffs cannot be collaterally impeached in ordinary cases; but where they are declared by statute to have the force and effect of judgments, this stringent rule does not apply. Consequently, it was held allowable to show that the return of a sheriff, that the bond is forfeited, is false, by proving that the defendant was ready on the day and at the place named in the bond to deliver certain property which had been levied on by execution, and for the return of which the bond stipulated.

The case of Monon and Nelson v. Weaver and Frow, 8 Ala. Rep. 288, is unlike the present. There the condition of the bond was to keep within the limits of the prison bounds, until the principal obligor should be thence discharged by due course of law, without committing any escape in the meantime. We held that a plea in avoidance, on the ground of a discharge under the statutes relating to insolvent debtors, is bad, if it does not aver that notice was given to the creditor, and that the discharge was the act of a judge or two justices of the peace, as contemplated by the act of 1821. The bond in the case cited, it will be observed, does not stipulate for the appearance of the debtor at a time and place prescribed, to take the benefit of the insolvent law, before certain designated officers; but requires him to keep within the prison bounds until he shall be discharged by due course of law. It is perfectly clear, that a compliance with his undertaking required that if he would relieve himself from the obligation, he should deliver a schedule of his property and take the oath of insolvency before the officer or officers appointed by the law to administer it, after having given the regular notice.

In the case at bar, the condition of the bond recites, that the officers named therein had designated a day when the debtor should appear and deliver his schedule and take the oath. If he gave the notice and appeared at the time and place appointed in good faith, and one or both the justices failed to attend, the condition was not forfeited. This is sufficiently shown by the cases cited from 3d and 7th Ala. Rep. There was evidence in respect to the notice, which should have been

submitted to the jury; but the Circuit Court, irrespective of this evidence, informed them that the discharge was irregular, and they should find for the plaintiff. We may place out of view the form of the oath administered, and the fact that the discharge was the act of a single justice; for the appearance of the debtor according to the terms of his bond, if notice had been given to the plaintiff, and he intended to comply with its condition, prevented a breach. The *quo animo* he appeared, was a question of fact for the solution of the jury, but their inquiries were forestalled by the ruling of the judge; they were not permitted to consider the sufficiency of the notice, or the purpose with which the debtor presented himself at the time and place designated by the bond. The charge diverted their attention from the appearance of the principal obligor, by explicitly instructing them that a discharge by one justice, when the law required two, and the oath which he had taken, were irregular and insufficient. In fact the court considered a prayer for instructions abstract, which assumed that the appearance of the debtor at the time and place specified in the condition of his bond, "to be heard," and his discharge by a single justice, though fraudulent, absolved the surety from liability. The cause went to the jury, if not upon a false hypothesis, at least upon such a view of it as was calculated to give them an incorrect idea of its merits, and withdraw from their consideration a perfectly available defence. It is clear they were misled, and that the defence suggested by the evidence has not been passed on.

In this action it is not permissible to enquire whether, the debtor after his arrest and the execution of the bond made a transfer of his property; however this may be, it constitutes no breach of the condition. It might perhaps have been urged before the justices had they met according to their appointment, and the plaintiff may in some other proceeding assert its invalidity.

The statement of the plaintiff's cause of action is in very general and indefinite terms, and if the suit was one instituted in the circuit or county court, we should be inclined to hold it bad on demurrer. But as the issue in appeals from justices of the peace is to be made up under the direction of the court, and great liberality is allowable in such cases, we think the

court might have either overruled or sustained the demurrer, without committing an error for which the judgment would be erroneous.

It is needless to add more than declare that the judgment is reversed, and the cause remanded.

LITTLE ET AL. *vs.* HEARD ET UX.

1. A return of no property upon an execution, issued on a final decree against the administrator in the Orphans' Court, but not made returnable to a regular term of the County Court, will not authorise the issuance of execution against the securities to the administration bond.
2. An administrator, who, as distributee of the estate, obtains a decree and execution against his co-administrator for assets received and not accounted for, cannot, on a return of no property, have execution against the joint securities of himself and co-administrator.

Error to the County Court of Sumter. Tried before the Hon. Preston G. Nash.

THE defendants in error,—the latter of whom was the widow of John Knox, and, in conjunction with John Steele, administered on her deceased husband's estate—on the final settlement of Steele's administration, obtained a decree against him for her distributive share, upon which an execution issued returnable to a monthly term of the Orphans' Court, and was returned no property. An execution then issued against the plaintiffs in error, who were securities on the joint bond of the administratrix and administrator. The plaintiffs in error superseded this last mentioned execution, and at the next term of the County Court, moved to quash it, but the court overruled the motion, and they now assign it as error.

METCALFE, for the plaintiffs:

1. The execution issued on the decree against Steele was returnable to the Orphans' Court, and was therefore void. A return of "no property" on a void execution, or an execution upon which property could not be taken, is insufficient to fix

the liabilty of the sureties on the administration bond. Graham v. Chandler, 12 Ala. Rep. 829; Westmoreland v. Hall, 11 Ala. Rep. 122.

2. A person pursuing a summary remedy given by statute, must conform strictly to the terms of the act, and that conformity must be shown by the record. Bettis v. Taylor, 8 Porter, 574.

3. To authorise an execution to issue against the sureties on the administration bond, there must be a decree against the principals in the bond. Clay's Dig. 305, § 45; Watkins v. Barret, 3 Ala. Rep. 707. Where a decree against an administrator is unauthorised, and after a return of no property to an execution issued thereon, execution issues against the sureties on the administration bond, the proper remedy is by supersedeas. Watkins v. Barret, 3 Ala. Rep. 707. The decree was improperly rendered against Steele alone, and the statute judgment consequent upon a return of no property, is void. Watkins v. Barret, 3 Ala. 707.

4. It is not material whether Heard and wife participated in the administration or not, for where *joint administrators unite in the same bond, they are jointly and severally liable, not only each for his own acts, but for the acts of the other.* Babcock v. Hubbard, et al. 2 Con. 536; Hughlett v. Hughlett, 5 Humph. Rep. 160; Brazier v. Clark, 5 Pick. 96; Clark v. State, 6 Gill & Johnson, 288; Brotton v. Bateman, 2 Dev. Eq. Rep. 115; Collins v. Carlisle's heirs, 7 B. Monroe, 15. To allow this execution to be enforced, would present the anomaly of the principal in a bond recovering thereon against her own security.

Hoyt, for the defendant.

CHILTON, J.—By the second section of the Act of 1832, Clay's Digest, 305, § 45, it is provided "whenever any execution shall have issued on any decree made by the Orphans' Court on final settlement of the accounts of executors, administrators, or guardians, and is returned by the sheriff "no property found" generally, or as to part thereof, execution may, and shall forthwith issue against the securities of such executors, administrators or guardians."

It is manifest from an examination of this statute, that to authorise an execution against the sureties in an administration bond, there must be—1st. A decree made by the Orphans' Court on final settlement of his account, against the administrator, which may be enforced by execution. 2d—An execution must actually have issued upon such decree, and have been returned no property found generally, or as to part; and 3d—There must be a bond, by which the securities are bound for the administrator's default. See Thompson v. Bondurant & King, 15 Ala. Rep. 346–351. Do these three requisites concur in the case before us, to sustain the execution which was issued against the plaintiffs in error? If they do not—if the record fails to show every material fact necessary to support this summary judgment against the sureties, the court should have quashed the execution as to them.

It appears that Eleanor Knox, the widow, and John Steele, administered upon the estate of John Knox, deceased, in April 1840, and entered into bond in the penalty of twenty thousand dollars, with William Little and Robert Clanton, the plaintiffs in error, as their securities.

A decree was rendered, on the final settlement against Steele, in favor of Heard, (who had married the widow) in right of his wife, and an execution was issued thereon, returnable to the court, awarding the decree, to be held the fourth Monday in November 1847. The stated terms of the County Court proper, for Sumter county, are holden the second Mondays in February and July (Clay's Digest 299.) This execution being returned no property found, an execution issued, without any previous order of the court, against the securities of said Steele, returnable to said court on the 4th Monday in January 1848. This being stopped by the clerk, afterwards another issued and was superseded. We do not think that it requires any previous order of the court, after an execution has been duly returned against the administrator, "no property found," to authorise the issuance of one against the sureties. The statute is peremptory in its requisition, and seems to contemplate its issuance as a ministerial duty of the clerk of the court. It is required to be issued *forthwith* after the return of the previous execution unsatisfied. But we are clear in the opinion, that according to the previous decisions

of this court, the execution which issued against Steele, the administrator, and made returnable to the monthly return day of the Orphans' Court, instead of to the stated term of the County Court, did not authorise the issuance of this *fi. fa.* which is sought to be quashed by the sureties. It has several times been decided by this court, that an execution issuing upon decrees of the Orphans' Court on final settlements, should be made returnable to the stated or semi-annual term of the County Court, and that a sheriff is not liable to the summary remedy which the statute gives, by motion, for his failure to return such execution, unless made so returnable. By analogy, it would seem to follow, that the sureties to the administration bond could not be proceeded against summarily in consequence of such irregular process. Were the question *res integra*, I should hold that the statute contemplated that executions issuing from the Orphans' Court should be made returnable to that court, and not to the County Court. The statutes upon the subject recognise them as distinct courts, having, it is true, the same officers, but keeping distinct records, the Orphans' Court having a special and limited jurisdiction, defined and prescribed by the various legislative enactments. But the question must be considered settled by the previous decisions—Westmoreland v. Hale, 11 Ala. Rep. 122; Graham v. Chandler, 12 ib. 829; and it would result in irreparable injury to many parties litigant now to disturb it. The execution in this case not having been made returnable as required by the rule recognised by the previous adjudications refered to above, there is no warrant for the subsequent execution against the sureties, and as that execution was also made improperly returnable to the Orphans' Court, instead of the semi-annual term of the County Court, it was irregular, and should have been quashed. Another question however, comes up in this case, which is not entirely free from difficulty. Mrs. Heard, whose husband in her right, is enforcing the execution complained of, was one of the administrators, and jointly bound with Little and Clanton, the plaintiffs in error, on the administration bond. The question then is, can one administrator by virtue of the statue before copied, enforce the collection of a decree against the co-administrator in her favor as distributee of the estate out of the sureties who are bound

jointly with both administrators in a bond for the faithful performance of their duties, &c.

In King v. Shackleford, 13 Ala. Rep. 435, we held, that one executor, who is also a creditor of the estate he represents, may file his intention in the Orphans' Court to compel a settlement and distribution of the estate, his co-executor having assets for which he fails to account. Nothing, however, is said as to the liability of their common sureties, for any default of the derelict administrator.

In Little, et al. v. Knox, administrator, 15 Ala. Rep. 576, it was held, that if administrators execute a joint bond, they are liable to a distributee for the acts of each other, and are both bound to protect the joint securities from the consequences of each other's acts. If this be a correct exposition of the law, it follows, the sureties cannot be held responsible to one of the administrators for the default of the other. To hold the law otherwise would present the anomaly of the principal recovering against her own sureties for the default of her joint obligor and co-principal. The bare statement of this proposition carries with it a sufficient refutation.

Let the judgment be reversed, and the cause remanded.

ROSSETT *vs.* THE STATE.

1. In a criminal prosecution, the only legitimate purpose, for which the accused can introduce evidence to show hostile feelings towards him on the part of a witness for the State, is to impeach his credit; and where, after such witness had testified to commissions by the accused of the offence charged at different times, it is proven that he did *a particular act* to entrap the accused, and thereby to procure additional evidence against him, it is not error in the court to refuse to instruct the jury, that "they might consider it as a circumstance tending to show that the witness had no proof before that time that would convict the defendant."

Error to the Criminal Court of Mobile. Tried before the Hon. John E. Jones.

PHILLIPS, for the plaintiff.

ATTORNEY GENERAL, contra.

DARGAN, J.—The plaintiff in error was indicted for retailing spirituous liquors in less quantities than a quart. A witness was examined by the defendant, who stated that one Joseph, who had been examined as a witness on the part of the State, gave him a dime and requested him to go and buy liquor of Rossett, the defendant. Joseph went with the witness to the grocery store of Rossett, and called for spirits.—Rossett replied that he had none, but if they wanted some, he would go and get it, which he did. After drinking, the witness offered the dime in payment, but the defendant refused to receive pay. It was also shown, that Joseph was displeased with Rossett, and the object of giving the witness the dime and taking the drinks was to entrap him. Joseph had sworn, that he had frequently drank at the store of the defendant and paid for it, before he gave the dime for the purpose aforesaid. Upon this evidence, the defendant requested the court to charge the jury, that if they believed the dime was given by Joseph to the witness for the purpose of entrapping the defendant, they might consider it as a circumstance tending to show that Joseph had no proof before that time that would convict the defendant. This charge the court refused, but certified the question to this court as one novel and difficult.

Although the conduct of Joseph in endeavoring to entrap Rossett, and his feelings of displeasure towards him, were properly admitted as evidence, yet we do not think that the court erred in refusing the charge requested. In criminal prosecutions it is permissible, on the part of the accused, to show that the feelings of the witnesses, who testify for the State, are hostile to him. 1 Greenl. Ev. § 450. Such evidence, however, is permitted to go to the jury, for the sole purpose of impeaching the testimony of the witness who has deposed under such a state of feeling, and the jury are the sole judges whether they will give any weight to his testimony, or whether it is entitled to beleif. They are to judge of the testimony tending to prove hostility of feeling, and also how far, or to what extent, this hostility of feeling—if they find a witness has

testified under its influence—shall impeach or destroy his testimony. The charge requested in this case, however, would treat the evidence introduced by the defendant as proof, tending to disprove a particular fact. This was correctly refused. The only legitimate charge that could have been given in reference to this testimony, was that it tended to impeach the credibility of the witness Joseph. This was the purpose for which it was introduced, and for this purpose only was it competent testimony.

The question of the jurisdiction of the Criminal Court of Mobile is not certified to us, nor brought before us by writ of error. We cannot, therefore, examine it.

The judgment must be affirmed.

POWELL *vs.* KNOX.

1. A judgment, rendered against a bankrupt before petition filed, is not a lien on real estate, held by him under an equitable title merely.
2. On the death of a trustee, the title deed of the trust estate devolves on his personal representative, and a notice to produce it, given to one of the *cestui que trusts*, is not of itself sufficient to authorise the admission of secondary evidence.
3. A certified copy of the record of a deed, from the court of another State, is not admissible as secondary evidence, unless it be first shown that the deed was registered by authority of law.
4. The possession of property by a bankrupt six years after he filed his petition, creates no presumption of fraud in the procurement of his discharge, and evidence of such possession, unaccompanied with other proof, is properly excluded from the jury.
5. The mere fact that a bankrupt, at some time prior to the filing of his petition, was owner of certain property, which is not returned in his schedule, raises no such presumption of fraud as will cast upon him the burden of explanation.
6. Where, upon the trial of an issue of fraud *vel non* in obtaining a discharge in bankruptcy, it is shown that five years before the filing of his petition the bankrupt was the owner of a certain slave, which was not rendered in his schedule, and that four years after his discharge the same slave was in his possession, the law raises the presumption that he was the owner of the slave during the *interim*, and devolves upon him the necessity of showing by competent proof that such was not the fact.

Error to the County Court of Lowndes. Tried before the Hon. Edward H. Cook.

This was a proceeding on supersedeas, sued out by the defendant against the plaintiff in error, to arrest and quash an execution, on the ground that the defendant was a certificated bankrupt, having obtained his discharge in 1842. By a bill of exceptions, found in the record, it appears that the judgment on which the execution issued was rendered before the petition in bankruptcy was filed, and that the defendant returned in his *schedule* "the one-seventh interest" in three eigthty acre lots or parcels of land in Wilcox county, which William Bonner had, some time before, conveyed by deed to one Spann, now deceased, in trust for the children of Sarah Knox, of whom defendant was one. The plaintiff insisted that his judgment was a lien on this land, but the court held otherwise. It further appears, that the plaintiff filed specifications of fraud, &c., and thereupon an issue was formed and tried by a jury. The plaintiff, having proven notice to the defendant to produce the original, offered to read in evidence a certified copy of the record of a deed, executed in 1826, in South Carolina, and there registered, by which Charles Spann, the grantor, conveyed to John F. Spann and another, both of whom were proven to be dead, certain personal property in trust for the separate use of Sarah Knox, *deceased*, the mother of defendant, during her natural life, with remainder to her children. To the introduction of this copy the defendant objected, and the court sustained his objection. The plaintiff also offered to prove that the defendant, at the time of the trial, (which was in 1848,) had in his possession a number of slaves, to the admissibility of which the defendant objected, and the court excluded the proof. The plaintiff read in evidence a deed, bearing date in 1819, by which Charles Spann conveyed to the said Sarah Knox during the term of her natural life, and to her children after her death, a certain parcel of land in the State of South Carolina, proved that the said Sarah Knox died before the defendant applied for the benefit of the bankrupt act, and shewed by the defendant's schedule, that he had not made a surrender of this land. He also proved, that in 1835-6 and '37, the defendant was in possession of, and exercised control,

as owner, over a certain slave by the name of William, and that the same slave was in his possession in 1846, and so continued until the death of the slave. William was not returned in defendant's schedule.

The plaintiff requested the court to charge the jury:

1st. That if they beleived from the evidence that the deed from Charles Spann conveyed to the defendant any title to or interest in the land in South Carolina, and that he failed to render in such interest in the schedule of his effects, then it was incumbent on him to show how he parted with that interest:

2d. That if they believed that the slave William was in the possession of the defendant in 1835-6 and '37, and was then his property, and that afterwards, in 1846, the said slave was in his possession and was then his property,—the presumption of law was, that he had continued to be his property during the whole interval between 1837 and 1846, and it was incumbent on the defendant to show why he had not rendered him in, in his schedule of effects.

The court refused to give either of these charges, and the plaintiff excepted, and he now assigns as error the several rulings of the court, as well as its refusal to give the above charges.

Gilchrist & Cox, for plaintiff.

Bolling & Stone, for defendant:

1. A decree in bankruptcy operates at once as a discharge of all the debts of the bankrupt, whether reduced to judgment or not. Sec. 4 Bankrupt Law of 1841; McDougald v. Read & Talbot, 5 Ala. Rep. 810.

2. If the plaintiff in error relies upon a lien created by his judgment on the real estate of the bankrupt, the onus is on him to show that the bankrupt had an interest in the real estate upon which the judgment might operate as a lien; otherwise the presumption of law would be that the bankrupt was discharged from the judgment.

3. The evidence, as set out in the bill of exceptions, shows that the defendant had only an equitable title to the real estate, which cannot form the basis of a judgment lien, nor be sold under execution at law. Land v. Hopkins, 7 Ala. 115.

4. The court below did not err in rejecting the copy of the

deed marked as Exhibit A. The preliminary testimony was not sufficient to authorise proof of its contents. Bethea v. McCall, pro. ami, 3 Ala. Rep. 449. Defendant in error was not a party to the deed, and could not be presumed to have it in his possession. Mordecai v. Beale, 8 Port. 529; Jones v. Scott, 2 Ala. Rep. 58; Beall v. Dearing, 7 ib. 124.

5. The execution of the deed should have been proved. 7 Ala. Rep. 124.

6. There is no law in this State, nor in South Carolina, requiring such deed to be received, and there the transcript cannot be read in evidence. Ib.

7. A copy of the deed was inadmissible as evidence, without proving that by the laws of South Carolina such deed was required to be recorded. Lee v. Matthews, 10 Ala. Rep. 682.

CHILTON, J.—It is very clear that the certificate of discharge in bankruptcy, when fairly obtained, operates a complete discharge to the bankrupt of all his debts which were proveable under the act, reserving however to the judgment or execution creditor such *liens* as had attached before the decree in bankruptcy was rendered. McDougald v. Reid & Talbot, 5 Ala. Rep. 810; Doremus, Suydams & Co. v. Walker, 8 ib. 194, 202. The lien, it is said in the case last cited, is preserved according to the rights of the creditor at the time the bankruptcy is established. In the case before us, the debtor had but an equitable title in the land, and it is well settled that such title cannot be sold under execution at law, but the statute in express terms declares that it shall be made liable by suit in chancery, and not otherwise. See Clay's Dig. 350, § 31—216, § 76. In Willis v. Elmore, 13 Ala. Rep. 360, it was held that a purchaser of land, who had made full payment, holding only a bond for title, had no such interest as could be sold under execution at law, and that one who purchased at the sheriff's sale acquired no title by the deed from that officer.

It seems necessarily to follow that as the interest is not subject at law to the judgment, no legal lien is created by the judgment upon it; for the lien results from the right which the judgment creditor has to have the land extended under the writ of *elegit*, and as the statute divests him of the right, the lien which is incidental to it must fail also.

The fact that the land was inserted in the schedule does not aid the plaintiff in error. It was the duty of the bankrupt to insert it, and if his title was equitable merely, the title which he possessed, as well as the personal property owned by him, immediately upon the decree in bankruptcy, became vested in his assignee; for the assignee succeeds to all the rights of the bankrupt, whether they be legal or equitable. Reavis v. Garner et al., 12 Ala. Rep. 661. It follows, therefore, that the court did not err in granting the motion to quash the execution, upon the ground of the supposed lien upon the real estate.

Neither was there any error in rejecting the copy of the deed from Charles Spann, sen. to John R. and Charles Spann, in trust for the wife of John Knox, remainder to her children, of whom the bankrupt was one. In legal contemplation, upon the death of a trustee, the title-deed evidencing his trust devolves upon his personal representative, along with the trust. It was recently held by this court, that upon the death of a trustee pending a suit instituted by him as such, the suit must be revived in the name of the executor of the trustee. See Mauldin, Montague & Co. v. Armistead, ex'r., 14 Ala. Rep. 702. As then the defendant in error was not the custodian of the deed, and it is not shown that he ever had it in his possession, a notice to his counsel was not sufficient without further efforts to account for the original to let in secondary evidence. It may further be observed, that had the plaintiff in error laid a sufficient predicate for parol proof of the contents of the deed, it is a clear proposition of law that a certified copy of the deed from what purports to be a copy upon the records of court in South Carolina, is not sufficient to authorise it to be read in evidence, in the absence of all proof that such instruments are authorised by the laws of the State of South Carolina to be recorded. Until then, the act of Congress prescribing the mode for certifying records from one State to another does not apply—*non constant*, there may be no warrant in that State for admitting it to record.

The questions raised upon the legal effect of the proof of possession of the slave William, as presented in the charge which was asked and refused, and in the charge given, as also with regard to the exclusion of the proof of possession by the defendant in error of the several slaves men-

tioned in the copy of the deed which we have noticed above as excluded from the jury, may be considered together and briefly disposed of.

In Hargrove v. Cloud, 8 Ala. Rep. 173, which is afterwards renewed in Petty v. J. B. & D. Walker, 379-383, it was said, the possession of property by a bankrupt, at the time of his discharge, or immediately after, which by industry he might reasonably have acquired, will not warrant the presumption that he did not make a full surrender of his estate. But when the amount of it is so great as to make it improbable that it was earned by him since the filing of his petition, it devolves on him to show how he became the proprietor of such property, whether by inheritance, bequest or purchase, and the *onus* of relieving himself from the imputation of fraud, in such case, is cast upon him who is best acquainted with the origin and nature of his title. It is said in the subsequent case above alluded to, that it was inferable from the record in Hargrove v. Cloud, that the bankrupt was in the possession of slaves *after filing* his petition, and the charge was, that possession *immediately* after the decree was a circumstance to create the presumption of fraud, unless explained by other evidence; and thus understood, this court expressed its satisfaction with the previous decision, but said, "it was a misapprehension to apply what was there said to cases where the possession was not immediate after the decree, or rather after the application; for neither the jury nor court can be supposed to know the means within the power of an individual to acquire by his industry or business the ownership of property. The rule is there laid down, that to cast on the bankrupt the *onus* of explaining how he acquired the property, and to raise a presumption of fraud, the possession must be refered to the time of the application, or to a time so recently thereafter, that no business or industry could reasonably have created a fund adequate to the acquisition of the property. In all other cases, it is said, it rests with the plaintiff to create the presumption of fraud, by showing that the business or industry of the defendant could not reasonably have furnished him the property which he held as owner.

Applying the principle settled by the previous decisions of this court to this case, we think it very clear that the County

Court did not err in excluding the evidence of the possession by the defendant in error of certain slaves, *at the time of trial*, which was more than six years from the time he filed his petition in bankruptcy. The evidence excluded in the case of Petty v. Walker, *supra*, was that a witness had heard the bankrupt say frequently, during the years 1844-5 and '46, that he was interested as part owner in several steamboats: *Held*, that the exclusion of the proof was not erroneous.

It is said that fraud is never to be presumed where all the facts and circumstances in proof may consist with purity of intention. Steele v. Kinkle & Lehr, 8 Ala. Rep. 352. The first charge asked of the court below conflicts with this principle; for it assumes that if the bankrupt had land before his bankruptcy, (the proof not showing how long before the filing of his application he was the owner,) it devolves on him to show that he was not the owner *at the time* of his application, if he failed to render it in his schedule. The second charge asserts that if the bankrupt, who filed his petition in February 1842, was in possession of a negro man in the years 1835-6 and '37, and was then the owner, and afterwards, in the year 1846, the same boy was in his possession and his property, and was not rendered in his schedule of effects, and no evidence was offered by Knox to show a change of possession, it was *prima facie* evidence that it was all the time the property of Knox, and cast upon him the duty of showing why he was omitted in his schedule of effects. The presumption of law is, that things are properly and legally in their existing state, and hence one in possession of property is presumed to be the rightful owner. 2 Phil. Ev. (C. & H. Notes,) n. 298, p. 925, § 6. So also, the law presumes that a fact continuous in its character, when once shown to exist, still continues to exist, until a change is shown to have taken place. The law presumes the continuance of a legal or actual possession—Ib.; Bayard's Lessee v. Colefax, 4 Was. Cir. Ct. Rep. 38; that a partnership continues; that a corporation continues to exist—4 Wend. 423; ib. 672; 9 ib. 351; or that an entry and an ouster by a landlord upon his tenant continues, till a restoration be shown. Applying these principles to the case at bar, we are of the opinion that although the possession or ownership several years anterior to the application for the discharge

in bankruptcy of property, whether real or personal, is not sufficient to create the presumption of ownership *at the time* of the application, requiring the party to explain how he had disposed of said property, yet when the previous possession and ownership is coupled with the subsequent possession, and no proof is introduced to explain the condition of the property in the meantime, the law does raise the presumption that the party who has the property in possession as owner at these two periods owned it in the *interim*. Unconnected with the possession subsequent to the application, the previous possession in 1834-5 and '36 was perhaps too remote to furnish a reasonable presumption of ownership at the time of rendering his schedule by the bankrupt, so as to cast upon the defendant the duty of showing how he had disposed of it. It would often be most difficult, and sometimes utterly impracticable, for a party to show and account for all the property he was possessed of years previously, and to impose upon the bankrupt this duty would be most onerous. But where he is shown to have been possessed of property and controlling it as owner, a few years before his application, and has the same property under his control after his discharge, there being no circumstances shown from which it may be inferred that he disposed of the property before his application and re-acquired it after that period, we think the legal presumption is adverse to the bankrupt, and that it is not only reasonable, but a duty he owes to himself, to explain the condition of the property at the time of his application. Unexplained, the *prima facie* presumption is that he had possession, and was the owner continuously from his first ownership to the time he is last seen in possession of the slave.

The charge of the court is opposed to this view, and the judgment is consequently reversed, and the cause remanded.

DUKE *vs.* THE CAHAWBA NAV. COMPANY.

1. The charter of a corporation cannot be declared void in a collateral proceeding, and evidence of fraud in the procurement of the charter is therefore inadmissible in a suit by the corporation against an individual.
2. The 13th section of the act incorporating the *Cahawba Navigation Company*, which suspends the right to collect toll upon report to the Governor, &c. that the river is not in the condition contemplated by the act, does not, on such report being made, divest the company of its corporate character, nor of its right to sue for and recover toll due to it, prior to the making of the report.
3. It is not indispensable to the right of said company to demand toll, under those sections of the act which authorise its collection upon the Governor's making certificate, &c., that the company should give either actual or constructive notice that such certificate had been obtained.
4. Nor is it imperative on the company to make a personal demand of toll, prior to the institution of a suit for its recovery.

Error to the Circuit Court of Perry. Tried before the Hon. John D. Phelan.

This was an action of assumpsit by the defendant against the plaintiff in error, for the recovery of toll on near three hundred bales of cotton, shipped on a flat boat of the plaintiff down that portion of the Cahawba river improved and rendered navigable by the said defendant, under the act of the Legislature incorporating it, &c. The defendant in error having proved the shipment of the cotton, and read the several acts of the Legislature of Alabama pertaining to its incorporation, the acts of Congress assenting thereto, the certificate of the governor, of its right to exact toll and the assessment of toll fixed by the company, the plaintiff offered to prove; 1. That the certificate of the governor had been procured by misrepresentation and fraud: 2. That since the institution of the suit, the governor, upon the report of a Commissioner, &c., had notified the defendant in error, that the river was not in the condition required by the charter, and that it was not authorised to receive toll, until the requirements of the charter were complied with by putting the river in navigable order. The defendant in er-

ror objected to all of this evidence and the court sustained the objection and excluded it from the jury. The court charged the jury in effect, that on the receipt from the governor of the certificate prescribed by the charter, the company had a right to charge toll, without any notice whatever, either actual or constructive, being given to the defendant—also, that it was not necessary, that the company should have demanded the toll of the defendant before the commencement of the suit.

To the rulings and charges of the court, the defendant below excepted and now assigns them severally as error.

A. GRAHAM, for plaintiff:

1. This is a private corporation, and notice before suit brought should have been proved. 4 Ala. Rep. 70, Carlisle v. Cahawba & Marion R. R. Co.

2. Fraud vitiates any act, even the most solemn, as for instance, judgments of courts. Certainly also, official certificates the most ceremonial. 4 Starkie, 586; 5 Kinne, 117.

A. B. MOORE, for the defendant:

1. The court properly refused to permit the defendant to show that the certificate of the governor was fraudulently obtained. The certificate of the commissioners must be taken as true, until the sovereign power interposes. See Selma and Tenn. R. Road Com. v. Tipton, 5 Al. Rep. 806, 807; Tar Riv. Nav. Com. v. Neil, 3 Hawkes Rep. 520; Duke v. Ca. Nav. Com. 10 Ala. Rep. 82.

2. As the corporation had gone into operation, and the right to institute this suit had been acquired before the commissioner declared the river to be out of order, such declaration was properly rejected as testimony in this case. The river might have been in order when the boat went out, and out of order when the examination was made. See Duke v. Ca. Nav. Com. 10 Ala. Rep. 91; Tar River Nav. Company v. Neil, 3 Hawkes, 520.

3. The company were not bound to do any act not imposed by the charter, and as the charter does not require notice to be given of the right of the company to charge toll, they are not bound to give it. See charter, pamphlet Acts, 1827. This is not a private act, but is what is called a public local act. See 1 Blackstone, note 59.

COLLIER, C. J.—By an act of the Legislature of 1827, the plaintiff below is made a body corporate, and provision is made for the subscription of stock and the election of directors, that the enterprise contemplated may be carried out. The 10th, 11th and 12th sections, authorise the directors to make regulations for "the receiving of toll," upon the governor's making the certificate which was given in evidence at the trial; and the 13th section suspends the right "to collect toll" upon a report being made to the governor by a person appointed by him that the river is not in the condition contemplated by the act.

1. The first question arising upon this bill of exceptions is, whether it was allowable to resist a recovery in the present suit by proving that the certificate of the governor was obtained by "misrepresentation and fraud." It is certainly true, that a person sued by an association assuming to be a corporation, may throw upon the plaintiff the burden of proving a corporate existence, yet it is equally clear that a charter cannot be adjudged void in an indirect proceeding. Thus in the President & Co. of the K. & C. Turnp. Road Com. v. McConaby, 16 Serg. & R. Rep. 145, an act of the legislature provided that when six hundred shares had been subscribed, the commissioners should certify that fact to the governor, who should incorporate the subscribers, &c. The certificate was made, and charter granted; whereupon the government subscribed twenty thousand dollars. Three hundred of the shares required to make up the number, were fictitious, subscribed for the purpose of deceiving the governor, and thus procuring the charter. The court said, "if this charter was deceptively obtained—obtained by false representations, it could not in a collateral action, in an action brought by the company to compel the performance of contracts entered into with it, be declared void. But if this had been fraudulently obtained, on which I am not called upon to give any opinion, still until that question had been directly decided, in a proceeding instituted in this court, which alone has jurisdiction, either by *scire facias* to repeal the charter, or declare it forfeited, or by writ of *quo warranto* at the suit of the State, in which the State must be a party, and a party to the judgment for the seizure of the franchise, there is no instance of calling in question the

right of a corporation for the purpose of declaring its charter void, but at the instance and on behalf of the government, and never on the relation of any individual. The State v. Carr, 5 N. Hamp. Rep. 371, lays down the law in equivalent terms; and it is added, "in cases of this kind, it is enough to show that there was a charter under which the corporation was acting, and that it was wholly immaterial whether the coporation had complied with the requisitions of the charter or not. That is a matter to be settled in a suit between the government, which created the corporation and the corporators, and not collaterally in a prosecution by another State against a stranger to the corporation." So in the Tar River Navigation Company v. Neil, 3 Hawkes Rep. 520, it was decided, that where by a charter, commissioners are directed to ascertain the performance of a condition precedent to incorporation, and they declare it though falsely, to have been performed, it shall be deemed true, until the soverign power interposes. A wrong doer sued by the corporation cannot show the falsity of such a declaration. In the Charles River Bridge v. Warren Bridge, 7 Pick. Rep. 344, the Legislature passed an act granting additional privileges to a bridge corporation, and providing, "that in consideration of the privileges so granted the corporation shall relinquish the additional toll on the Lord's day, from and after the passing of this act." It was held, that this relinquishment was a condition subsequent, the non performance of which, was a matter between the government and corporation only, and could not be taken advantage of by a stranger, to invalidate the grant: *Further*, if a corporation obtain an extension of its charter by false and colorable representations to the Legislature, it may be made the ground of a *quo warranto*, but a stranger cannot take advantage of the fraud to deny the validity of such extension. See also S. & T. Rail Road Co. v. Tipton, 5 Ala. Rep. 787, and cases there cited.

The principle decided by the cases we have noticed is too firmly settled, to be now overturned by a judicial decision; they are directly in point and some of them strikingly analogous in their facts. It is abundantly shown by them that in a controversy between a corporation and an individual, the question of fraud in obtaining the charter could not be inquir-

ed into; that this rule applies whether the corporate functions are consummated by a legislative enactment, or there is some condition precedent, which an official act of the governor or some other officer must affirm has been performed. If the State acquiesces in the fraud practised, either upon the legislature or officer to whom the power was delegated to act in the matter, an inquiry will not be made whether a corporation *de facto* is entitled *de jure* to the privilges claimed by it. Such an inquiry can only be made at the instance of the public in a proceeding appropriate, and in which the judgment would be definitive of further controversy upon the point. It was then not permissible to show that the certificate of the governor in the present case was obtained by fraud.

2. The report made to the governor subsequent to the institution of this suit, did not divest the corporate character of the plaintiff, but merely took from it the right to demand toll for the time being. It might sue upon any cause of action which previously accrued in the same manner as if the report had not been made. This is an obvious conclusion, unless the report operated retrospectively, or was sufficiently potent to annul the act of incorporation, or the subsequent proceedings.

3. It was not indispensable to the plaintiff's right to demand toll, that it should have given notice either actually or constructively, that the certificate of the governor had been obtained. The certificate itself was a public act, the evidence of which must have remained in the office of the Secretary of State, and all persons must be supposed to have been cognizant of it. Publication in a newspaper or otherwise was not required by the act of the Legislature, and it is not competent for the courts to add another condition than that imposed as an indispensable prerequite to the right to collect toll.

4. It was not imperative upon the plaintiff to make a personal demand of the defendant, previous to the commencement of the suit. The defendant we have seen, was bound to take notice at his peril, that the certificate of the governor, which entitled the plaintiff to toll, had been furnished; on this the plaintiff's right depended to require compensation of the defendant for the passage of his boat down the river. The failure to pay made the right of action complete, and there was

no more necessity for a request previous to the institution of the action than in any other case in which a debt is sought to be recovered or a duty enforced. It will be seen from the slightest examination, that the case of Carlisle v. The C. & M. Rail Road Co. 4 Ala. Rep. 70, bears no analogy to the present, but is sustained by reasoning and principles that cannot be here applied.

We have but to add that the judgment of the Circuit Court is affirmed.

DARGAN, J.—I dissent from the conclusion attained by the court. I admit that the defendant could not show by proof in a collateral suit, that the plaintiff obtained its charter of incorporation by a fraud on the public, but this, in my opinion, is not the character of the evidence. The defendant does not contest the corporate character of the plaintiff, for it was a body corporate before it had any right to demand toll. The certificate does not make it a corporation, but is the evidence merely of the right of the corporation to demand and receive toll, and I think it is clearly competent for the defendant to show, that this right or title was obtained by fraud. It does not negative the corporate character of the plaintiff, but denies its title to demand the toll, notwithstanding it is a body corporate.

VAUGHT *vs.* WELLBORN.

1. In a suit at law on a note given for the purchase money of slaves sold and delivered to the defendant, damages in respect to them, resulting from the tortious act of the vendor's wife committed in his absence, cannot be allowed as a discount or set off, it not appearing that the husband consented to the tort, or gave it his subsequent sanction.
2. A wife, without the privity of her husband, has no power to rescind his contracts.

Error to the Circuit Court of Madison. Tried before the Hon. Daniel Coleman.

This was an action of debt instituted by the plaintiff against

the defendant in error on a note for $3000, made payable to one James B. Vaught, and by him assigned to the plaintiff. The facts of the case are sufficiently noticed in the opinion of the court.

Robinson, for plaintiff in error:

1. If the payee were suing on this bond, the proof by Paris would not sustain either the plea of payment, fraud, want of consideration or failure of consideration. Wellborn obtained a complete title and possession under it, and retained that possession two years. And so having and retaining it, his right was good against the whole world. Being so, it cannot be truly said that he has been deprived of that right by the wrongful act of any person whatever. And whenever the act complained of gives him a clear remedy by action against the wrong-doer, he must resort to that remedy, and cannot rely upon it under either of the pleas.

2. This proof is not admissible under the plea of set-off, because, 1st.—If it be a good claim at all, it is for unliquidated damages. 1 Chitty's Pl. 571; 2 Sand. Pl. & Ev. 790, and the cases there cited. 2d—Setts-off to be good, should be of mutual debts and in the same right. Van Pheel & McGill v. Connally & Andrews, 9 Porter 452. Suppose the proof to show that Vaught's wife had possession and that defendant had a right to recover damages of James B. Vaught. Could these damages be relied upon under this plea? This right to damages could only be enforced by an action against J. B. Vaught and wife. In such case the action must be for the tort either by trover, detinue or trespass. In either case the action is founded upon the tort of the wife. 1 Dunlap's Prac. 20, 21; 1 Chitty's Pl. 92, 93, 121; 2 Comyn's Digest, 235; 2 Saunders Pl. & Ev. 572. In trespass, the gist of the action is the wrongful taking: in detinue and trover, the gist of the action is the wrongful detainer.—1 Sand. Pl. & Ev. 434. From which it appears that for all torts of the wife during the marriage, the action must be against the husband and wife—then if it must be against husband and wife, the right to recover these damages cannot be set-off against the plaintiff's demand. For, where an action is brought for the tort of the wife, and the wife die before judgment, the suit would abate

as to the husband.—1 Chitty's Pl. 92, 93. This consideration brings this case precisely within the case in 9 Porter, cited above.

Parsons & Clay, for defendant:

1. The note in this suit mentioned was assigned, but the defence is good nevertheless. In such cases the defendant is to be allowed the benefit of all the payments, discounts and set-offs existing before notice. Clay's Dig. 381, § 6.

2. Was not the evidence in this case good, under the pleas of failure of consideration? In every sale of personal property there is an implied warranty of title. Cozzens v. Whitaker, 3 Stew. & Porter, 322. And this, we think, includes an obligation on the part of the vendor, that *he* will do no act to defeat the sale. If a man deprives himself of the power to perform his covenant, that is a breach of it. 2 Bacon's Ab. Title, Cov. 592, (new edit.) As it will be a breach of the vendor's warranty for himself to dispossess the vendee of the thing sold, we contend that the same result follows, if the vendor's wife dispossess the vendee; and this, not only on the ground of his general liability for her acts, but because the action of detinue, for her acts in this case, would lie against him alone without joining her. 1 Chitty's Pl. 84; Bacon's Ab. Title, Detinue, and note g. The husband is liable for all the *torts* and trespasses of the wife during the coverture. 1 Bacon's Ab. 503, L. If goods came to a *feme covert* by *trover*, the action may be brought by husband and wife, but the *conversion* must be laid only in the husband: Ib.; Coke Litt. 351, b.; 2 Kent's Com. 149: husband held liable for a *conversion* by his *wife*, though they were *parted*. Bacon's Ab. 487, g; Vern. 143. Husband may be sued *alone* for a conversion by the wife after (during) marriage—if sued for a joint coversion, the declaration should charge *conversion to the use of the husband*, not of both. Estill v. Fort, 2 Dana, 238; 1 Wheaton's Sel. 296. This warranty was, of course, at the time of the sale. It was before the note was assigned. It provides against its own breach, and secures a remedy, from the time it was made, against its own subsequent violation. The right of indemnity secured by the warranty, is anterior to the assignment of the note. For this reason it may be made a defence against the

note, although assigned. As the vendor is individually liable in detinue for the conversion of his wife, the vendee may rely on this as a failure of consideration to avoid circuity of action. The failure of consideration is a good defence. Gee, adm'r v. Nicholson, 2 Stew. 512. To a note given for a ferry, where the ferry was afterwards recovered from the purchaser, the plea of failure of consideration is good. Evans v. Mitchell, 1 Stew. & Porter, 226.

3. Whenever defendant may maintain a cross action for damages, on account of a defect in personal property purchased by him, or for non-compliance by plaintiff with his part of the contract, the defendant, in an action against him on the note for the purchase money, may claim a deduction corresponding with his injury—1 Stewart & Porter 71. This doctrine is affirmed as to personal property,—1 Ala. Rep. 647–'49: and again asserted as to personal property in Cullum v. Br. Bank at Mobile, 4 Ala. Rep. The doubt expressed in Wilson v. Jordan, 3 Stew. & Por. 72, as to the case in 1 Stew. & Por. 71, is overruled by the two cases last cited. Plaintiff's note in the hands of defendant in right of his wife, although payable to a third person, is available by defendant as a set-off, if there was a promise by plaintiff to pay it to defendant. French v. Garner, 6 Porter, 549, 640. In the present case, the indorsee, who is an endorsee without consideration, admitted enough in regard to this note, to enable the defendant to rely on his defence.

4. But there is another view in which this defence is good. There are many cases to show that a purchaser has an election whether to rescind or to insist on his purchase, as in the case of his discovering a fraud in the sale. In such cases the purchaser may alone rescind the contract. But both parties may rescind any contract. The plaintiff's wife, for whom he is individually responsible, did rescind the contract on her part, and the defendant on his part rescinded it by insisting on this defence, which makes a case of failure of consideration.

CHILTON, J.—The sole question for our consideration is, whether the Circuit Court properly admitted so much of the deposition of Elizabeth Paris, to be read to the jury, as

shows that Catharine Vaught, the wife of James B. Vaught, pointed out the two slaves given in part consideration of the note sued on, to the soldiers under the command of Gen. Scott, and required them to take possession of them. The solution of this question must depend on the legal effect of the evidence which was admitted.

The proof shows that James B. Vaught was the owner of three slaves, besides others, which he acquired in right of his wife Catharine, from the estate of her father, the same having been duly delivered to him by the personal representative of the estate: That he sold the said three slaves to the defendant and received the note sued on, a portion of which has been paid and credited upon said note, the name of said James being first signed to said credit, but afterwards stricken out, and the name of the present plaintiff inserted. The slaves were delivered to the defendant, who kept them for some time, and being informed by the vendor that he had better remove them out of the Cherokee Nation, as he might have some difficulty in regard to them when the Government should remove the Indians, he refused to do so. It was also shown in evidence, that said Catharine, who belonged to the Cherokee tribe of Indians, and the said James B. Vaught, lived unhappily together, and before the emigration of the tribe by the Government to Arkansas, had separated. During the preparation for the removal of said Indians, and when the said James B., and wife were living separate (he residing in the State of Tennessee, studying medicine,) the said Catharine went with the witness, whose deposition was objected to, and pointed out two of the slaves which had been sold by her husband, and claiming them as her property, induced the soldiers to take charge of them. The note given, as before stated, in consideration of the three slaves, had been previously assigned, but whether the defendant had any notice of the assignment before the slaves were so seized, does not appear by the record.

According to our statute, the defendant is entitled "to the benefit of all payments, discounts and sets-off, made, had or possessed against said note, previous to notice of the assignment"—Clay's Digest, 383, § 6. Keeping in view this statute, let us enquire as to the character of the defence. It is clear

that the property in the slaves vested by the sale in the defendant, and the contract, so far as James B. Vaught was concerned, was complete—neither is there any question raised between the parties, as to the right of the soldiers, or Mrs. Vaught, to seize upon the two slaves; but it is conceded that the act was unauthorised and tortious. The question then as to the admissibility of the deposition of Elizabeth Paris, resolves itself into this: Is the trespass or tortious act of the wife, in which the husband did not in any way participate, such a discount or set-off, as under the statute above refered to, may be made available to the defendant when sued by the assignee of the note?

The seizure of the two slaves by the soldiers was a matter wholly disconnected with the contract of sale, which had long before that time been fully executed by the vendor. The original sale cannot therefore be affected by it, upon the idea of a failure or partial failure of consideration. As to allowing the proof, as showing a demand existing in favor of the defendant against James B. Vaught for the tortious act or trespass of his wife, we are aware of no principle of law which would tolerate it. In the first place, the damages which the defendant sustained by the trespass are unliquidated, and must be ascertained by the jury before they can be made certain. McCord v. Williams & Love, 2 Ala. Rep. 71; Sherman v. Ballow, 8 Con. Rep. 304. But conceding this to be no objection, then another principle, which is well settled, comes up to exclude it, which is, that the demand must be due from the plaintiff to the defendant—6 Cow. 261; 9 Porter's Rep. 452, that is, the defendant can not set-off a joint liability against his separate liability. Now allowing the defendant the benefit of all defences he could render available as against James B. Vaught, were he instead of William Vaught the plaintiff, we think it very clear, that the demand which the defendant claimed, as predicated upon the seizure of the two slaves, was not one which he could assert as against James B. Vaught alone, but that in such suit the wife, Catharine Vaught, would be an indispensable party. It is said, if goods come into the possession of husband and wife during coverture, he may be sued alone in detinue for the detention, 3 B. & Ald. 685–689; Com. Dig. Tit. Baron & Feme, Y. Brown

on Actions ta Law, 249; but in this case they have never come to the husband's possession. The general rule is, that for all torts committed by the wife alone, in person, the husband and wife must both be sued. Bacon's Ab. Baron & Feme, L.; Brown on Action, 249; 35 Law Lib. (3 series) 182; so the action must be brought against both, if the wife entice away, or harbor a servant. See authority last cited; 1 McCord, 578. Mr. Chitty says, that for torts committed by the wife *during* coverture, the husband and wife must be jointly sued; but if goods be delivered to *husband and wife* during coverture, detinue lies only against the husband.—1 Chitty's Pl. 92–3. So it has been held that in action for the tort of the wife, committed without her husband, the plaintiff cannot unite in the same declaration a tort committed by the husband alone: ib. 2 Wils. 227. The bill of exceptions sets out all the proof on both sides, and from it, it does not appear that the negroes ever came to the possession of either husband or wife, since the wife "handed them over" to the soldiers in her husband's absence, as shown by the deposition of Paris. The wife has lived apart from her husband from a period anterior to the trespass—she emigrated with her tribe to Arkansas, and he, living with another woman, removed to Texas. The negroes were in possession of the soldiers under command of Gen. Scott, and were demanded *of the latter by the defendant*, who refused to give them up, and here the proof leaves them. Now we have been unable to find any adjudicated case, or any legal analogy furnishing a warrant for holding, that the tortious act of the wife under the circumstances of this case, can create such a charge against the husband as will constitute a set-off or discount in favor of his vendee when sued in an action at law upon the note given for said slaves. The learned counsel have refered us to the case of Estill and wife v. Fort, 2 Dana's Rep. 237. This decision is but an affirmation of the doctrine laid down by Sergeant Williams in his note appended to the case of Welbrahan v. Snow, 2 Saund. Rep. 37–47, P. who thus states the law. "If a woman has been guilty of a conversion *before* her marriage, or a wife, without her husband converts goods during coverture, this action (trover) lies against husband and wife; in the former case, the declaration must state the conversion *to be to her own use;* unless the sub-

ject matter is in existence, and the husband refuse to deliver it up on demand, in which case the course of precedents seems to warrant the laying of the conversion *to their own use;* and in the latter case, the *conversion* must be laid to the use of the husband only; however, if the conversion be the *joint act* of the husband and wife, it seems the action may be brought against the husband alone; for the conversion in such case is held in law to be the act of the husband only." He further proceeds to say, that the action is well brought against husband and wife charging a delivery to them and a conversion by *them* to the use of the husband, because a wife may be guilty of a conversion as well as of a trespass or disseizin, but not to her own use. From all which, it seems to me to result, that where the husband has been guilty of no tort, or wrongful detention, and is sought to be charged for the wrongful act of the wife, *solely* upon the ground of that unity which by legal fiction attaches to the marital relation, the action must be against husband and wife, and not against the husband alone. See McKown and wife v. Johnson, 1 McCord, 578; 2 Baily 411. If this principle be well founded, it results that as the demand existing against husband and wife cannot be set-off against a debt due from the husband alone, (Morris v. Booth and wife, 8 Ala. Rep. 908; 10 Bar. & Cres. 558,) the proof of the existence of such demand was irrelevant and should have been rejected by the Circuit Court. There is no defect of title in this case, as supposed by the counsel. The title was good it seems, and vested absolutely in the defendant. His possession has been disturbed by the trespass of the wife, for which he has his action for damages against husband and wife, but, as we have shown, not against the husband alone.

In respect to the last point raised by the counsel for the defendant in error, viz, that the contract was rescinded, we need only remark, that the record shows no rescision of this contract, and that the wife by her unauthorised act, done wholly without the privity of the husband, has no power to rescind his contracts, any more than she has to make contracts for him. See authorities refered to, 2 U. S. Digest, 500, B.

Whether, if the wife have possession of the slaves, and this note has been assigned without consideration, as is contended

by the counsel, the defendant has not a remedy in a court of equity, the said James B. Vaught being a non-resident and insolvent, is a question which we need not now decide.

Let the judgment be reversed, and the cause remanded.

VASTBINDER *vs.* SPINKS, SHERIFF, AND SECURITIES.

1. It is a good defence to a rule against the sheriff, for not returning an execution to the court from which it issued within the time prescribed by law, that it was delivered to the plaintiff, and that he undertook to return it.
2. The Sheriff, on a trial of a rule against himself and securities for failing to return an execution, is incompetent to testify against the plaintiff.

Error to the Circuit Court of Clarke. Tried before the Hon. John Bragg.

RULE by plaintiff against defendants in error, for the failure of Spinks to return an execution, &c. The excuse relied on in defence was that the sheriff had delivered the execution to the plaintiff, who promised to return it. In the course of the trial, the sheriff himself was permitted by the Court, against the plaintiff's objection, to testify in his own behalf. The remaining facts, upon which the decision rests, are to be found in the opinion of the court.

JEWETT, for plaintiff:

1. The sheriff's liability will not be discharged by showing that the plaintiff acted as the agent of the sheriff in making the return, unless it be shewn that the former acted negligently, or in fraud of his trust, or that he expressly waived his right to proceed against the sheriff.

2. The admission of Spinks' evidence was clearly an error, he being the party sought to be charged and directly interested. Roberts et al. v. Henry, 2 Stew. 42; 3 Port. 385; 7 Ala. 786.

BLOUNT, contra.

DARGAN, J.—This was a rule against Spinks, as sheriff, and his securities, for failing to return an execution to the office of the Clerk of the Circuit Court of Clarke, from which it issued, three days before the commencement of the term to which it was returnable. An issue was made up, and the cause submitted to a jury. It appeared that the sheriff had delivered the execution to the plaintiff himself, who undertook to return it, but failed to do so within the time prescribed by law. The court charged the jury, that if the plaintiff undertook, as the agent of the sheriff, to return the execution within the time prescribed by law, and failed to do so, the sheriff was not liable.

1. A sheriff who receives executions from different counties must necessarily return them to the court from which they issued, either by an agent or by mail, as it would be impracticable for him to go himself to every county to deliver them to the different clerks. If the plaintiff himself undertakes to perform this duty for the sheriff, and fails to return the writ within the time prescribed by law, the failure is the result of his own neglect, for which the sheriff is not responsible. In the case of McClure v. Colclough, 5 Ala. 65, it is said, that if the plaintiff or his attorney induce the sheriff to delay the return of the execution, neither the sheriff nor his securities are liable for a failure to return, because the plaintiff has the right to control his own process. If the sheriff is entitled to be excused for failing to return at the request of the plaintiff, surely he should not be held responsible, when the failure results from the neglect of the plaintiff, and without any negligence or default on the part of the sheriff.

2. But we think the court erred in permitting the sheriff to testify on the trial to the facts on which he relied as an excuse for failing to return the execution. He was not only directly interested, but was a party to the suit. It is true, that a failure to return an execution, within the time prescribed by law, admits of a reasonable excuse, and it is competent for the sheriff to show that he ought not to be charged with the penalty prescribed by the statute, notwithstanding the failure to return within the prescribed time. Roberts & Battle v. Henry, 2

Stew. 42. But in a suit or proceeding against the sheriff to recover this penalty, he must establish this excuse as he would any other defence, that is, by competent and disinterested testimony.

The judgment must be reversed, and the cause remanded.

BIRCH *vs.* TILLOTSON.

1. Where in an action on a promissory note by the endorsee against the maker, the defence set up is a want of legal title in the plaintiff, a plea verified by affidavit is not necessary, but evidence appropriate to the issue may be introduced under the plea of *non assumpsit*.
2. A bankrupt, who, after his discharge, becomes the *bona fide* holder of a note payable to himself, which had been returned in his schedule and sold by the assignee, is remitted to his original title, and may transfer it by endorsement, so as to vest the right of action in his endorsee.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

John T. Taylor, for plaintiff in error:

1. The plaintiff had the right to fill up the endorsement of Crawford & Gandy to himself, and being in blank, it has the same legal effect as if filled up, and the defendant could not prove property in the assignee of Crawford & Son, without a sworn plea. See 10 Ala. Rep. 817, and the numerous cases there cited, decided by this court; 9 Port. 309; 14 Ala. R. 619.

2. The plaintiff showed a clear legal titile through the endorsements, and the defendant could not show a right in a third person, unless he shows some offset or claim against such person. 5 Ala. Rep. 135.

3. Even if the title had vested in the assignee in bankruptcy, he had a right to dispose of it by sale under order of the court, and this having been legally done, as appears from the evidence, and the paper being negotiable and endorsed by the payees, the legal title would pass to the purchaser at the bankrupt sale by delivery, and from him to the plaintiff in the same way; and the possession of plaintiff is sufficient evidence

of his title in this way. Even if the note had been endorsed by these intermediate holers, the plaintiff had the right to strike out their names, so far as the maker is concerned, and claim under the first or second endorser.

CAMPBELL, for the defendant:

The question presented in this case is, can a party take a note under an endorsement from a bankrupt after his act of bankruptcy? The evidence shows that the note formed a part of the bankrupt's assets; that it was sold in January 1846, and in the same month remitted to a firm in Mobile for collection. The note was specially endorsed to this firm by the bankrupt, and not by the assignee, and by that firm afterwards endorsed by the plaintiff. 2 Esp. 611; 2 H. B. 335; 10 East. 418; 1 Comp. 279.

CHILTON, J.—This was an action of assumpsit upon a promissory note made by defendant to James Crawford & Son, endorsed by the payees to Crawford & Gandy, and by the latter endorsed in blank. The pleas were non-assumpsit, payment, and set off. Upon the trial the defendant was allowed to prove, against the plaintiff's objection, that the payees of the note, James Crawford & Son, had taken the benefit of the bankrupt law; that the note now sued on was embraced in the assets rendered in by them and turned over to the assignee in bankruptcy, and that it was sold by him on the 19th January 1846, and purchased at said sale by one Daniel Iverson. It was further shown, that the note was endorsed to the firm of Crawford & Gandy *solely* for the purpose of collection, and that said firm had not at any time any interest in said note, but merely endorsed it for the purpose of collection, and handed it so endorsed to the attorneys of the plaintiff, in January 1846. This evidence was objected to by the plaintiff on two grounds: 1st—Because, he insisted, it was irrelevant under the issues; and 2d—Because no claim, offset or equity was alleged to exist against the assignee in bankruptcy or other person. The court having overruled the objections, charged the jury that if they believed the evidence, the legal title to the note was still in the assignee in bankruptcy, and the plaintiff could not maintain this suit.

On the part of the defendant in error, it is insisted that no one can acquire the legal interest in a note under an endorsement from the payee who becomes bankrupt, and makes the endorsement after he is so declared.

The objection on the part of the plaintiff in error, that the assignment could not be taken advantage of, as passing no legal title, unless upon plea supported by affidavit, is not tenable. It is certainly incumbent upon every plaintiff at law to show that he has the legal title to that which he seeks to recover, and the want of such legal title is fatal upon the plea of non-assumpsit to an action in which this is the appropriate issue. In Pinkerton v. Adams & Milner, 2 Esp. Rep. 611, it was objected that the proof of the endorsement of the note sued on after the endorser had become a bankrupt could not be admitted under the general issue; but Lord Kenyon said he was clearly of opinion it could be given in evidence under the general issue, *non-assumpsit*, for the defendant did not undertake to pay that to which the plaintiff had no legal title, which was the case here. This decision results as a consequence from the bankrupt act, which declares such transfers void, and vests the legal as well as equitable title of the bankrupt's property in his assignee. Our act of 1841 gives to the decree in bankruptcy the effect of transferring to the assignee all the bankrupt's *choses in action* and effects of every kind; so that it is very clear, if after a decree in bankruptcy and before a sale of this note by the assignee, the bankrupt payee had attempted to negotiate it by endorsement or otherwise, it would have been a fraud upon his creditors, and the legal title having passed to the assignee in bankruptcy, could not have been transmitted by the bankrupt to his endorsee. Such is the opinion above refered to.

The cases of Thompson et al. v. Underhill & Guest, 10 East. 417, and Pinkerton, assignee, &c. v. Marshall, 2 H. Bla. Rep. 334, present controversies between the assignee of the bankrupt and those claiming under him by a negotiation subsequent to the act of bankruptcy, and are all distinguishable from the case at bar. In this case the bankrupt returned the note sued on in his schedule, and the assignee duly sold it under the decree; so that no question is raised as between the plaintiff and the bankrupt's assignee or creditors. The only ques-

tion raised is, do the facts set out in the bill of exceptions show that the legal title to the note is in the plaintiff? By the decree the bankrupt's title, as we have said, vested in the assignee. The law required him to make sale, and thereby he becomes divested of the title. We will not say that the purchaser of a note at the assignee's sale may sue in his own name upon it in the absence of an assignment by the assignee The facts before us do not call for such a decision. But in our opinion, the note having been assigned by the payee, after the assignee in bankruptcy had sold it, we must intend that it was purchased by the payee from Iverson, the purchaser at the bankrupt's sale, and being the payee, and thus remitted to his original legal title, that he could have sued upon it in his own name. If this be true, then it follows he could transfer it by his endorsement. Suppose he had regularly transfered it before his bankruptcy, and afterwards had acquired it—would it not have been perfectly competent for him to have stricken out the assignments which had previously divested him of his title, and relied upon his original right to maintain his suit? Clearly so. How then is the case altered by the decree in bankruptcy? This only vests the title in the assignee, whose sale divests his interest, and when the bankrupt again becomes the *bona fide* holder of the paper, we see no reason why the intermediate process through which the note has passed should prevent his original right of action from reviving, any more than a transfer by his endorsement would when he afterwards acquires the note. The case in 1 Camp. Rep. 279, to which we are refered, does not militate against this view. In that case, one of two purchasers, after the commission of a secret act of bankruptcy by his copartner, transfered in the firm name a negotiable security, and the acceptors being notified by the assignee in bankruptcy not to pay the bill, refused payment. Held, that under the English statute, the transfer was invalid and the plaintiffs were not entitled to recover.

We must presume that the firm of James Crawford & Son acquired the note after the sale made by the assignee; this being the case, we see no consideration of public policy, nor any principle of law, which forbids them to indorse it so as to pass the legal title. By the recovery and satisfaction of the judgment, the note is cancelled and discharged, and this is the main

consideration, so far as the defendant is concerned, who does not gainsay the debt, but only insists that the holder of the legal title must sue.

Let the judgment of the Circuit Court be reversed, and the cause remanded.

COCKRILL'S ADM'R. *vs.* HOBSON, USE, &c.

1. Where an endorser of a negotiable note has received from the maker effects of sufficient value to discharge it, and in consideration thereof, promises to pay it, proof of demand and notice is not necessary to charge him, whether the promise was made before or after the maturity of the note.
2. Where a count in a declaration by the endorsee against the personal representatives of the endorser of a negotioble note, avers, that that by an agreement between the maker and endorser the surplus value of certain slaves, held by the latter as an indemnity, was, after the payment of the sum of $4646 13, to be applied to the discharge of several notes, of which the note sued on was one, and in the event the endorser should keep the slaves, &c. the surplus should be ascertained by three disinterested persons, &c , and further avers that said surplus was sufficient fully to indemnify the endorser, &c:—*Held*, that the count is not defective, because it fails to aver that the surplus had been ascertained in the mode designated by the agreement.
3. The statute of *non-claim* does not begin to run in favor of the personal representative of the endorser of a negotiable note, until its maturity.
4. The fact that an endorser, without the knowledge of the endorsee, was indemnified by the maker, and demand and notice thereby waived, cannot have the effect to set the statute of *non-claim* in operation before the maturity of the note.
5. The maker of a negotiable note is a competent witness for the endorsee in an action against the endorser for the purpose of proving that he has fully indemnified the latter.

Error to the County Court of Franklin. Tried before the Hon. Richard S. Watkins, Judge.

ASSUMPSIT by defendant against plaintiffs in error on the endorsement by their intestate of a promissory note made by David Deshler, dated 18th January 1840, at twenty-eight

months after date, and payable at the Planters' Bank of Tennessee at Nashville. The suit was instituted on the 23d July 1842. The declaration contained five counts, to the third, fourth and fifth of which a demurrer was interposed. The third and fourth counts, as far as is necessary, are set out in the opinion of the court. The fifth, after reciting an agreement between Deshler, the maker of the note, and the intestate of the defendants, which provides, that the maker shall have the benefit of the overplus of certain negroes, then in possession of Cockrill, the intestate, after refunding to him, or after he has retained a sufficient amount of them in value to satisfy himself the sum of forty-six hundred and forty-six dollars and thirteen cents, to be applied to the payment of certain notes due by the maker, among which is the note sued on, and that if the intestate should keep the negroes in final satisfaction of the $4646 13, "the negroes shall be valued by three disinterested individuals"—one chosen by the maker, one by the intestate, and the third by one Merrill, the person who was once the owner of the slaves and the debtor of both of them, should he think proper to appoint an arbitrator—avers, that the note of $2300, mentioned in the said agreement, is the same note declared on, and "that the overplus value of said slaves alluded to in said instrument over and above the $4646 13, all interest and charges on the same, &c., was more than enough to fully pay off and discharge the demand sued for, and that said John Cockrill so fully and amply secured himself against all losses, that might otherwise have arisen to him touching his liability as endorser on the note sued for, and so waived the necessity of demand of the maker, and notice" &c. The court overruled the demurrer to each count: whereupon the defendants plead the general issue and statute of non-claim. In the progress of the trial, the plaintiff offered Deshler, the maker of the note, as a witness to prove the value of the slaves embraced in the agreement between him and Cockrill, the intestate, to which the defendants objected, but the court overruled the objection and allowed him to testify. The defendants asked the court to charge the jury: 2d. That the agreement, executed by Cockrill, and which is set out in the fifth count of the declaration, and which was introduced in evidence by the plaintiffs, does not afford any evidence of

an acknowledgment of said Cockrill, that he had funds in his hands furnished by Deshler to pay the note sued on. 3d. That if Cockrill was never called on to have the negroes valued according to the agreement, although their value, after payment of the $4646 13, would leave an overplus in Cockrill's hands, yet that excess of value cannot be regarded as funds in his hands to pay the note sued on: 4th. That the statute of non-claim began to run from the grant of administration to the defendants on the 5th of October 1840. Each of these charges was refused and the defendants excepted, and now assign the refusal of the court to charge as requested, and its several rulings as error.

Nooe, for the plaintiffs in error.

Wm. Cooper, for the defendants.

COLLIER, C. J.—1. The third count alleges, that the intestate, previous to the maturity of the note indorsed by him, received from the maker, "property, money, bank notes, and effects, sufficient to pay off and discharge it," with interest, &c., and that in consideration thereof, he undertook and promised to pay the same, and thereby waived the necessity of notice of demand and non-payment. These allegations we think are a sufficient substitute for demand and notice, and if proved, when taken in connection with other parts of the declaration would entitle the plaintiff to recover. In the fourth count it is alleged that the intestate "in consideration of property, money and bank notes, by him received of and from" the maker of the note, undertook and promised to pay the same. It is immaterial whether this promise was made previous or subsequent to the maturity and dishonor of the note, being made upon an adequate consideration it would in either case dispense with notice of non-payment. The agreement set out in the fifth count, provides that the maker "shall have the benefit of the entire overplus" of certain negroes then in the intestate's possession, "after refunding to the latter, or after he has retained a sufficient amount in value of them, to satisfy himself the sum of forty-six hundred and forty-six dollars and thirteen cents; this overplus is to be appropriated by the ma-

ker to the payment of certain notes, among which is that now in suit. It is further provided, that if the intestate should keep the negroes in final satisfaction of the sum designated, then they shall be valued by three disinterested individuals—one chosen by the maker, one by the intestate, and the third by the person who was once the owner of the slaves, and the debtor of both of them, should he think proper to appoint an arbitrator.

It is objected to the fifth count, that it does not aver that the value of the slaves had been ascertained by an arbitration as contemplated by the agreement: *Further*, that it is not avered that the excess of value above forty-six hundred and forty-six dollars and thirteen cents, was sufficient to pay off the note, the amount of which is now sought to be recovered. The count contains precisely such an averment as the second objection supposes to be wanting, consequently the point made does not arise. Conceding that it was indispensable to the plaintiff's right to recover in *an action upon the agreement*, that the value of the slaves should have been adjusted in the manner it provides, and still the plaintiff might excuse a failure to give notice of non-payment, by showing that the intestate was sufficiently indemnified, though the arbitrators had not acted in the matter. This proposition is perfectly clear, if we will only bear in mind that the maker of the note is not seeking to enforce the agreement, but the plaintiff, an endorsee of the intestate, who was a prior endorser, no party to the agreement, and consequently not authorised to move in settling the value of the slaves, offers other evidence to the point, by way of excuse for not performing what would otherwise be a legal duty.

2. The next question we propose to consider is, whether the endorsement of a negotiable promissory note gives to the endorsee such a *claim* against the endorser as must be presented to the administrator of the latter within eighteen months after the grant of administration, although the endorser or his administrator have not been made absolutely liable by notice of the dishonor of the paper? In King & Barnes v. Mosely, 5 Ala. Rep. 610, it was decided that the statute of *non-claim* begins to run from the time the *claim accrues*, which may be previous to the accrual of the *cause of action;* as in the case of

a promissory note or other evidence of debt running to maturity and not due. This decision is rested upon the terms of the act, which so far as material to notice, requires that "all claims against the estates of deceased persons shall be presented to the executor or administrator, within eighteen months after the same shall have accrued, or within eighteen months after letters testamentary, or letters of administration shall have been granted to the executor, or administrator, &c."—Clay's Digest 195, § 17. *It is further held*, that where a bond in a certain penalty was executed, with a condition to make title to land upon the payment of the purchase money, the statute did not begin to run until all the money was paid; for until then, the obligor was not in default, and an action could not be maintained for the penalty against him or his personal representatives. So in Pinkston v. Huie, 9 Ala. Rep. 252, it was determined, that upon a bond conditioned to make title to land in a convenient time after a *feme covert* attained her majority, the statute of *non-claim* begins to run from the time she comes of full age, and not from the time that letters testamentary or of administration upon the obligor's estate were granted. These decisions were reaffirmed in Jones' ex'rs v. Lightfoot, 10 Ala. Rep. 17, where it was distinctly conceded, that where the liability to pay money is contingent and may never happen, there is no such claim as the act contemplates; and consequently no presentation is necessary until the event happens.

The liabilty of an endorser is *contingent*, and where the paper is mercantile, only becomes absolute upon a demand being made of the primary party, and notice given of the dishonor. His undertaking is *conditional*, viz, to pay in the event the maker and drawer fails, and he is promptly advised of the fact. Until these steps are taken to charge him, the holder has no claim against the *endorser;* for until then, it cannot appear that the debtor, whose punctuality the endorser has conditionally guaranteed, will not comply, and if he does not, that the holder will make the guarantee absolute by performing the condition upon which it depends. Such being the contract of endorsement, the cases cited are in principle directly in point, and conclusively establish that the *claim* of the plaintiff against the defendants or their intestate *did not accrue previously to the maturity of the note;* and consequently the act

cited did not begin to run until that time. See also Neil v. Cunningham, 2 Porter's Rep. 173.

It is argued for the defendants that if their intestate was indemnified, so as to dispense with notice of non-payment, that then his undertaking was absolute, and the statute began to run from the grant of administration. The indemnity was the result of an agreement between the intestate and the maker of the note, of which, from any thing appearing to the contrary, the plaintiff had no knowledge; and whatever may have been its effect, if he had been informed of it, yet being ignorant, it could not prejudice his rights, or deprive him of a remdy to which he would otherwise have been entitled. This proposition we think is sufficiently illustrated by its statement. But is does not by any means follow, that because the contract of the intestate with the plaintiff was *conditional*, and the liability it imposed *contingent*, the endorsee shall not be permitted to show, that in consequence of an arrangment between the former and the maker of the note, the intestate had waived his right as an endorser to insist upon a notice, and was liable at all events. The two questions are disconnected with each other, and the fact that the agreement and endorsement evidence a contract between different parties, and the plaintiff was ignorant of the former, cannot prevent the plaintiff from claiming any benefit from it, though he will not be prejudiced by it.

We think Deshler was not disqualified by interest from proving that the property received by the defendant's intestate was an adequate indemnity. A verdict for or against either party would not in any manner affect the question of his liability as the maker of the note. If the plaintiff was unsuccesful, or if his judgment against the defendants remained unsatisfied, he might prosecute his suit against the witness, and the record in the present case would conclude nothing in that action—in fact it is difficult to conceive how it could be used for either party. The witness would not be liable to the plaintiff for the costs, if he failed, or chargeable to him otherwise, to a greater extent than he would be to the defendants should a recovery be had against them on their intestate's endorsement. The measure of the liability in each case, would be indicated by the face of the note. As to the mode in which

the witness might satisfy the one party or the other, this could not affect his competency. The plaintiff would be entitled to the money, while the witness might discharge the demand of the plaintiffs by appropriating the "overplus value of the slaves" (as it is designated.) This would be considered as moneys' worth, and at most the effect resulting from the different modes of satisfying the witness's liability would go only to his credit.

No reason is perceivable why the agreement between the witness and the intestate should render inapplicable the principle which recognises the competency of the maker of a note to give evidence in a suit against an endorser. 3 Phil. Ev. C. & H's notes, 1545, *et seq.*; Stewart v. Conner, 9 Ala. Rep. 803. The right of the witness to recover the value of the slaves beyond the amount of the sum they were intended to pay the intestate, was not drawn in question; nor can we perceive how it could be in the present case. We repeat that the inquiry as to their value was made merely for the purpose of showing that the plaintiff was relieved from the obligation to give notice of the dishonor of the note.

What we have said will relieve us from the necessity of doing more than giving a passing notice to the charges to the jury. The second charge was rightly refused, or if given, to prevent the jury from being misled, the court should have informed them that although the agreement *per se* did not show that the intestate had funds, provided by Deshler, to pay the note sued on, or amount to a stipulation, that "if Merrill did not pay it," he (intestate) would, yet if the value of the slaves was sufficient to pay the $4646 13, and the note also, a matter which they were to determine from the evidence, then the agreement would be such an indemnity as would excuse the failure to give notice of non-payment. The other notes for which the "*overplus*" was chargeable, were payable long previous to that upon the endorsement of which the defendants are sued; and as there is nothing said in the record in respect to them, it may be infered that they were promptly paid at maturity, or they have been since paid by a party primarily liable. If these inferences are unfounded in fact, and the indemnity is insufficient to discharge all the notes, the defendant may make defence against those still unpaid; but in the

present posture of the case, they can have no influence. The questions arising upon the remaining charges have been already considered, and our conclusion upon the entire case is, that the judgment of the County Court must be affirmed.

CARLISLE *vs.* HILL.

1. Where the acceptor of a bill of exchange, drawn for his accommodation, disposes of it at a rate of discount greater than the legal rate of interest, the contract is usurious, and being thus infected, the purchaser cannot be regarded as as a *bona fide* holder.
2. Where one, who is not a *bona fide* holder, acquires a bill of exchange from the acceptor, he takes it in respect to the other parties to the bill, subject to any defence which they could set up against the party from whom he received it.
3. Where the evidence is conflicting, the court commits no error in charging upon it hypothetically.
4. Where there is some evidence in support of the defence set up, a charge, the effect of which is to withdraw the evidence from the consideration of the jury and to determine that it does not sustain the defence, is properly refused.
5. A charge, based on a hypothetical state of facts, directly opposed to the evidence, should not be given.
6. Waiver of notice of non-payment by the drawer of a bill cannot be implied from his receiving of the acceptor, after he has been discharged for want of notice, ample indemnity against his *general liabilities* for him.
7. If ample indemnity against his liability on a bill is received by the drawer from the acceptor, notice of non-payment is not necessary to bind him, but a partial indemnity is insufficient to excuse want of notice.

Error to the Circuit Court of Dallas. Tried before the Hon. Geo. W. Stone.

This was an action by the plaintiff against the defendant in error as the drawer of a bill of exchange for $5,500, drawn on and accepted by William Bower & Co., in favor of A. W. Coleman, and by him endorsed, payable at the Bank of Mobile. The material facts disclosed by the bill of exceptions are, that

the plaintiff lent William Bower & Co. $4,500, and received the bill of exchange in suit, dated on the same day, and payable nine months after date. It appears by the proof, that Hill & Coleman were in the habit from year to year of signing papers in blank for the purpose of enabling William Bower to renew a large debt due by him to the Life Insurance and Trust Co., and some of the testimony conduced to show that they also furnished them to enable William Bower & Co., who were factors and commission merchants in Mobile, to raise money for the prosecution of their business, but on this point the evidence was conflicting. One of these blanks was filled up by Bower on the day of the loan, before it was shown to the plaintiff, and converted into the bill of exchange now in suit. It did not appear that the plaintiff had any notice other than would be implied from the above state of facts, that the bill had been filled up by Bower, or that he had used it for a purpose different from that intended by the drawer and endorser, when they put their signatures on it. The money obtained from the plaintiff was used by Bower & Co. in their general business as factors and commisson merchants, and not in the payment or renewal of any debt for which the defendant was bound. Other facts are noticed in the opinion of the court. The plaintiff asked the court to charge the jury:

1st. That if they beleived from the evidence that the plaintiff obtained said bill of exchange from Bower & Co. without notice of the circumstances under which it was furnished to said Bower & Co., before the maturity of the bill and for the sum of $4,500 actually paid, and without notice that it had been delivered in blank by Hill to Bower & Co., then the plaintiff was a *bona fide* holder and entitled to recover: which charge the court refused to give, but instructed the jury that if the said Bower & Co. had misapplied it in passing it to the plaintiff—that is to say, that if Bower & Co. received the bill from Hill to extend the debt to the Life Insurance and Trust Co. on which he was already liable, and Brown & Co., instead of so applying it, passed it to plaintiff at a greater discount than eight per cent. and for a different purpose, then the plaintiff was not a *bona fide* holdor and could not recover.

2. That if they believed from the evidence that the plaintiff received the said bill of exchange from said Bower & Co.

without notice of any of the circumstances attending its creation and for whose accommodation made and negotiated, and became the holder thereof before maturity and for the sum of $4,500 then paid, that then under the state of proof the plaintiff was entitled to recover of the defendant the amount so paid by him for said bill of exchange; which charge was refused.

3. That if they believed from the evidence that the said blanks so furnished by the defendant to Bower & Co. were furnished for the purpose of renewing or extending others previously filled and sold by Bower & Co., and on which defendant was bound as drawer or endorser, or for the purpose of raising money to pay said bills so sold and about to mature, that then the said $4,500 so paid for said bill was a loan of money or advance of money to Hill the defendant, as well as to Bower & Co., and that the said Hill was not entitled to notice of protest to charge him on said bill of exchange, and that plaintiff was entitled to recover: which charge was also refused.

4. That if Hill had received an assignment of all Bower & Co.'s effects to indemnify him against his general liabilities, and this bill formed a part of such general liabilities, then Hill was not entitled to notice; which charge the court refused to give, but charged the jury that if, before the maturity of this bill, Hill had received an assignment of all Bower & Co.'s effects to indemnify him against it, then that would dispense with notice, but that an indemnity would not have that effect unless given before the maturity of the bill, and was also given to indemnify against this bill, &c.

To the several refusals to charge as requested, and to the charges given, the plaintiff excepted, and now assigns them as error.

I. W. Garrott, for plaintiff in error:

1. The first charge asked for should have been given—1st. Because there is no evidence tending to show that the contract of the plaintiff was usurious. The bill was made, it is true, to raise money, but there is nothing in the evidence to establish the fact that this money was to be raised on a usurious contract. The bill was offered in market and was *sold* to the plaintiff. The question of usury is a question of inten-

tion, and to make good the defence of usury, it should have been shown that the plaintiff intended to receive usury by evading the statute. This was not done; he was ignorant of the circumstances under which the bill was made.—Cameron et al. v. Nall, 3 Ala. Rep. 158; Wright v. McAlexander, 11 ib. 236. 2. If plaintiff was not guilty of usury, then he was entitled to recover, although the note may have been applied to a different purpose to the one intended by the defendant.—Saltmarsh v. Juthill, 13 Ala. Rep. 390, 404. 3. The charge ought to have been given, because there was evidence tending to show that the blank out of which this bill was made was given with others to Bower & Co. to raise money to carry on the commission business generally; and although there was a conflict of proof on this point, the court ought to have left the jury to weigh the evidence and to determine whether or not the bill was misapplied by Bower & Co. This, however, the court refused, by refusing this charge; and this refusal and the charge given immediately afterwards took this question of fact entirely from the jury.

2. The charge first given was erroneous, for the reason already given, to-wit, that the plaintiff bought the bill, having no notice of the circumstances under which it was made, and not being a party to any usurious contract (for there was no proof that there was any such between any of the parties.) He was therefore an innocent holder of the bill, and entitled to recover. Cameron et al. v. Nall, 3 Ala. Rep. 158.

3. The second charge asked for ought to have been given, for the reasons already stated, and this additional reason: There was proof tending to show that the defendant furnished Bower & Co. with this and other blanks to be used in their general business as commission merchants; and though there was a conflict of proof on this point, the court should have left the jury to determine, as before stated, whether or not this bill was misapplied; because, if it was not applied to a purpose different from that intended by the drawer, then clearly the plaintiff was entitled to recover the $1,500 which he had paid for this bill, *although the contract under which he paid it may have been usurious*—Saltmarsh v. Juthill, *supra*; otherwise the law would suffer defendant to inflict a fraud upon plaintiff.—Chitty on Bills, 9 Am. Ed. 335; Story on Bills, 191, 253.

4. The third charge asked for was also proper. If the defendant gave the blanks to Bower & Co. for the purpose of raising money to pay or extend the Life Insurance and Trust Co. debt, and Bower & Co. used them to raise money, and the plaintiff paid the money thereon without notice of the particular purpose for which the blanks were given, then Bower & Co. were the agents for defendant in negotiating the bill, and he is bound by their acts, and the plaintiff would be entitled to recover the sum actually paid by him on the bill as money loaned to defendant; and as the bill was given solely for this purpose, and defendant had no funds in the hands of Bower & Co. out of which the bill was to be paid, the defendant was not entitled to notice of protest—he was not and could not be injured for want of a notice. Story on Bills, § 275; ib. § 313, a.; Chitty on Bills, 9 Am. Ed. 468.

5. The last charge asked for was proper, and the court should have given it in the words in which it was asked, (Hinton v. Nelms, 13 Ala. Rep. 226;) and although the court may have subsequently given in substance the charge asked for, that is not sufficient—see same case.

If defendant had received as an indemnity against all his liabilities for Bower & Co. an assignment of their effects, and this bill was a part of such liabilities, then he had no right to expect or demand notice of the dishonor of the bill, because he was already indemnified, (Story on Bills of Ex. § 316;) and the court should have permitted this question of fact to go to the jury. But the court most effectually deprived the jury of the right to determine this question, by refusing the charge asked for.

The court also erred in the charge given immediately afterwards. That charge in effect states the law to be this—that an accommodation drawer or endorser *cannot* be so indemnified against his general liabilities as to excuse notice; but that the only indemnity which will excuse want of notice is an indemnity against a particular bill or particular bills. This is clearly not the law. This is a question of agreement between the parties who made this bill. They or any of them had a right to make any arrangement they might choose as to their liability thereon, and by that arrangement to waive notice, either generally or specially; and if defendant did receive in-

demnity against his general liabilities, and this bill was among those liabilities, he had a right so to do, just as much as he had a right to take indemnity against any particular bill or bills, (Story on Bills, § 320;) and it being a question of fact, the court should have left the jury to determine it, and not have decided it as a question of law.

Lapsley & Evans and Saffold & Bolling, for defendant in error:

1. The first charge prayed for by the plaintiff was properly refused. The principle assumed in the charge asked for is in direct opposition to the law, as determined by this court in Saltmarsh v. Tuthill, 13 Ala. The charge given is free from error, and is fully sustained by the case of Saltmarsh v. Tuthill, *supra.*

2. The second charge requested by the plaintiff, when taken in connection with the proofs to which it refers, is but a reiteration of the first.

3. The third charge prayed for is abstract, but if otherwise, the charge could not appropriately have been given. The statement of the evidence, given in the bill of exceptions, in connection with this charge as asked for, shews that there was not a particle of evidence to rest it upon. The action is on the bill; Hill, if liable at all, is liable on the bill. The mere fact (if there had been any proof to authorise such an inference) that the money was to be paid on some indebtedness of Bower, on which Hill was already liable, does not make Hill the debtor of Carlisle, nor dispense with the necessity of notice to Hill. The ultimate destination of the money cannot affect the legal rights of the parties, or change the character of the transaction.

4. The last charge asked for, as respects the supposed indemnity, was properly refused. Applied to the facts as stated on the record, there was certainly no pretence for such a charge. Hill had received no indemnity against the bill. The charge asked for assumes that if Hill had received an assignment of effects of Bower, to indemnify him against his general liabilities, whether productive or not, that this would excuse the want of notice—a proposition which certainly cannot be supported.

5. That the bill was in the hands of the acceptor, is notice

to the holder that it is but accommodation paper. Wallace v. Br. Bank at Mobile, 1 Ala. 565; Saltmarsh v. P. & M. Bank, 14 Ala. 668. The holder becomes possessed of the bill, by violation of a public statute, and so he is precluded from the protection accorded to a *bona fide* holder. He takes the bill, chargeable with notice of every infirmity in the bill. Saltmarsh v. Tuthill, and Saltmarsh v. P. & M. Bank, *supra.*

The transaction between Bower & Co. and Carlisle, the holder, was a *loan* of money, and not a sale of the bill, and if more than the rate of 8 per centum per annum was reserved, it was usurious. See Saltmarsh v. Tuthill, and Saltmarsh v. P. & M. Bank, *supra;* Powell v. Waters, 17 Johns. 179; Munn v. Com. Co. 13 Johns. 55.

CHILTON, J.—This was an action of assumpsit by the plaintiff in error against the defendant as the drawer of a bill of exchange, for the sum of five thousand five hundred dollars, drawn on William Bower & Co. and by them accepted, payable to A. W. Coleman or order, at the Bank of Mobile, and by him endorsed to the plaintiff. Many special pleas were interposed by the defendant, avering among other things fraud in the execution of the bill—want of consideration, usury, &c., but as no question arises upon the pleadings, it will be unnecessary to state them more particularly.

The points for our revision arise out of a bill of exceptions which was sealed by the presiding judge. It appears that the plaintiff loaned to W. Bower & Co. the sum of $4500 cash, and on the day it bears date received from them the bill in suit for $5500, having nine months to run. It was shown that this bill was with several others signed in blank by Hill & Coleman, and that they were in the habit from year to year, of signing papers in blank, for the purpose of enabling William Bower, and William Bower & Co. to renew a large debt due from Bower to the Life Insurance & Trust Company, on which Hill was bound as surety for Bower, and also to enable them to raise money for the prosecution of their business, said Bower & Co. carrying on the business of Factors & Commission Merchants in the city of Mobile. The bill in suit was filled up by Bower, before it was shown to the plaintiff, and the latter had no notice of the manner in which the bill had

been drawn and filled up, or the purpose for which it was executed, save such as the law may imply from the above facts.

The plaintiff asked the court to charge the jury, that if they believed from the evidence, that the said plaintiff obtained said bill of exchange from said Bower & Co. without notice of the circumstances under which the same was furnished to them, before the maturity of said bill, and for the sum of four thousand five hundred dollars actually paid, and without notice that it was in blank when handed by Hill to Bower & Co. then the plaintiff was a *bona fide* holder, and entitled to recover. This charge, the court refused, and charged in lieu thereof, that if the firm of Bower & Co. misapplied the bill in passing it to the plaintiff—that is to say, if Bower & Co. received the bill from the defendant to extend the debt in the Life Insurance & Trust Company, on which he was already liable, and Bower & Co. instead of so applying it, passed it to the plaintiff at a greater discount than eight per cent, and for a different purpose, then the plaintiff was not a *bona fide* holder, and could not recover against Hill.

Before proceeding to state the other charges, let us examine the correctness of the charge refused and that above stated, as given. We think the proof most satisfactorily shows that the contract, by which Bower & Co. parted with this bill to the plaintiff, was usurious. In the hands of Bower the bill was no more than waste paper, as it was in blank and endorsed for his accommodation, and until put in circulation, or negotiated by him, had no vitality. This being the case, the law is well settled, that if the bill is sold at a rate of discount greater than the legal rate of interest, the contract is usurious. Were the law not so, the facilities afforded for avoiding the statute of usury would render it a dead letter upon the statute books. See Metcalfe v. Watkins, 1 Porter's Rep. 57–91; Munn v. Commission Co. 15 Johns. Rep. 56; Powell v. Walters, 17 ib. 179; Saltmarsh v. Plant. & Mer. Bank, 14 Ala. Rep. 668, 680, and other authorities cited. In the case last cited, which is very analogous in its facts to the case at bar in respect to the question of usury, we held, that Bower & Co. being the holders of the bill was evidence to charge the endorsee contracting with said firm, with notice that it was drawn by Hill and endorsed by Coleman for the accommodation of

the acceptor, who by its negotiation gave it vitality. The plaintiff having advanced $4500 in money in consideration of the bill transfered to him by the acceptors, being for $5500 and having nine months to run, and thus agreeing to receive one thousand dollars, instead of $270, the lawful interest, must be regarded as a usurious holder, and being affected by usury, cannot be considered a *bona fide* holder. This was expressly decided by this court in another of this class of cases not very unlike the present. See Saltmash v. Tuthill, 13 Ala. Rep. 390–410. The principle settled in the two cases last refered to is decisive to show, that the court did not err in refusing the first charge asked by the plaintiff, or in giving the charge in lieu thereof; not being a *bona fide* holder in the usual course of trade, the defendant could set up any defence which would have availed him as between the original parties, to defeat the plaintiff's action, and as there was some evidence to show that the bill had been misapplied by Bower & Co. and used for a purpose different from that designed by the drawer when he signed it, it was perfectly correct in the court, to charge hypothetically, that if the jury believed the bill had been so misapplied, and they should find the contract usurious, the plaintiff was not entitled to recover. The charge of the court did not, as the counsel supposes, exclude from the jury the investigation of the fact whether the bill was misapplied, but the jury were to determine the fact in the affirmative before the charge could affect the result of the case. Where the evidence as to the existence of a fact is conflicting, the court may hypothetically state the fact as existing, and predicate his charge upon it. If the charge thus given is supposed to influence the mind of the jury in determining upon the fact, the opposite party should pray the court to state the law as applicable to the converse of the facts supposed.

We have already said that the plaintiff, having acquired the bill by a usurious contract from the acceptors, must be charged with notice that the defendant drew it for the accommodation of the acceptors, and that if the bill was used for a purpose other than that for which it was drawn, it could not be recovered. It follows as a corollary, that the second charge prayed for by the plaintiff was properly refused; for it assumes, irrespective of the question, whether or not the bill was misapplied,

that the plaintiff, if he had on notice of the manner in which it was drawn, &c., was *under the state of the proof*, entitled to recover the $4500 advanced by him for the bill. The usury let in the defence of misapplication, (Saltmash v. Tuthill, *sup.*) and the evidence conflicted as to the fact upon which the defence rested. It would therefore have been improper in the court to have decided that the proof did not sustain the defence, which is the effect of the charge. Philips v. McGrew, 13 Ala. Rep. 255; Nabors v. Camp, 14 Ala. Rep. 460.

The third charge which was prayed for by the plaintiff below, is clearly abstract, as there was no proof (as the bill of exceptions distinctly avers,) that the money was advanced to be used in the payment of any debt for which Hill was bound, or that it was so used. On the contrary, the only witness who testified on the subject, (and that witness was Bower himself) swore that he obtained the money to use in his general business as commission merchant, and that it was so used. The court should not charge the jury in the absence of all proof upon which to predicate such charge, much less should it be required to charge upon a hypothetical state of facts directly opposed to all the proof. The last charge prayed for by the plaintiff, asserts the general proposition, that if an accommodation drawer receives from the acceptor of the bill an assignment of all the acceptor's effects to indemnify him against his general liabilities, although such liabilities exclusive of the bill sued on, may amount to a sum greatly beyond the extent of the indemnity, still the drawer is not entitled to notice of non-payment, and this irrespective of the time when the assignment was made. The charge under the state of facts as shown in the bill of exceptions would have been well calculated to mislead the jury, as the evidence was that no indemnity had been afforded the defendant until after the maturity of this bill, and then was given to provide against the liability of the defendant generally, he being liable for the acceptors for the amount of some $70,000 aside from this bill. It is not denied but that the defendant was entitled to notice, unless this indemnity excuses it. The accommodation drawer for the benefit of the acceptor is entitled to notice, even though he knew the acceptor was insolvent when the bill was drawn. Story on Bills, § 375, 311, 312, 314, 316, 369, 370. The same

author futher says, in section 376, "the fact that the acceptor has told the drawer before the maturity of the bill, that he could not take it up, and the drawer must, and that the acceptor has given money to the drawer for that purpose, will not excuse the want of due presentment; nor that the drawer, in apprehension of the dishonor of the bill, has lodged other money of the acceptor in the hands of the endorser, upon an undertaking by the endorser to return it, if he should be exonorated from the payment of the bill." Cleage v. Cotton, B. & P. 239.—The rule requires that the drawer must either expressly or impliedly consent to waive the notice required by law to hold him liable. This could never be implied from his receiving indemnity from the acceptors, even though it should be ample, against his general liabilities, *after* he had been discharged for want of notice; for the bill in such case created no liability and consequently would not be provided for by the indemnity. But the authorities above refered to are conclusive to show that under the proof in this cause, there can be no doubt of the right of Hill to be notified in due time of the non-payment of the bill, and as the only indemnity which Hill received of any value, was a negro woman slave, who was turned over to him by Bower & Co., after the bill matured, it follows that the charge asked, taken in connection with the proof upon which it was predicated, was erroneous and calculated to mislead the jury. If a surety, or endorser, or accommodation drawer, receive *ample* indemnity against a liabilty which they have incured, in such case notice is not required, or in case of a surety, he is not discharged by delay being given by the creditor to the principal debtor.—4 Ala. Rep. 223–4. In such case, says Judge Story, he cannot complain of any loss or injury for want of notice, since he has funds in his hands to meet the payment. Story on Bills, 316, and authorities in n. 2. But partial payment or indemnity will not dispense with notice.

Construing the charges refused and those given as applicable to the facts of the case, we think there can exist no doubt of the correctness of the decision of the primary court in refusing the charges prayed for, and that the charges given, especially the last one, is as favorable to the plaintiff, and perhaps more so, than the law will warrant. Let the judgm't be affirmed.

Dargan, J., not sitting.

EXPARTE JEWETT.

1. Where it is manifestly for the interest of an infant, a Court of Chancery will authorise a sale of its real estate; but before it will do so, the facts which render the sale necessary must be alleged and proven, that the Chancellor may clearly see that the interest of the infant will be thereby promoted.
2. The removal of the trustee and infant beyond the limits of the State is not in itself sufficient to induce a Court of Chancery to order a sale of the real estate of the infant.

Error to the Chancery Court of Mobile. Before the Hon. Joseph W. Lesesne, chancellor.

Lockwood, for plaintiff.

DARGAN, J.—The plaintiff filed his petition in the Chancery Court of Mobile, alleging that Hezekiah Gates in the year 1841 conveyed to him a lot of land in the city of Mobile, for the sole use and benefit of Adele Gates, the wife of the grantor, and their children, but that the deed contains no power of sale. That Mary Gates and Ada Gates, who are infants, are the only children of Adele and Hezekiah Gates. It is also alleged that since the making of the deed, Hezekiah Gates, his wife and children, have removed to the state of Iowa, where they intend permanently to reside, and the petitioner to the State of Ohio, in consequence of which it has become difficult to attend to the property; and that owing to this change of circumstances, it is greatly to the interest of the beneficiaries, that the property should be sold and the proceeds converted into other property, to be appropriated in like manner to their use; and the petition concludes with a prayer for a decree, authorising the petitioner to sell the property, and that the proceeds be received either by him or by Hezekiah Gates and his wife. The deed refered to is attached as an exhibit, and affidavits in support of the petition were also submitted with the written consent of Mrs. Gates, that the land should be sold. In this condition the cause was submitted to the chancellor for a decree, but he ordered the infant children to be made parties to the proceeding. The petition was not

amended, but publication was made requiring the infants to appear and contest the allegations of the petition and guardians *ad litem* were appointed for them, who answered denying the allegations of the petition. In this condition the cause was again submitted for a decree, and was dismissed by the chancellor.

The only necessity for resorting to a court of equity for authority to sell grows out of the interest of the infants in the land, for it is very certain that the deed of the trustee and Mrs. Gates would be as effectual to pass her interest, without a decree, as with one authorising the sale. We will therefore examine whether a court of equity, under the allegations and proof, ought to decree a sale as against the infants. We have no statute in this State, that has any influence on the question, and we must therefore be governed by the general rules applicable to courts of equity. It is said, that under peculiar circumstances, when it is manifestly for the interest of the infant, guardians may change the nature of their estate from personalty to realty, or from realty to personalty—2 Story's Equity, (4th edit.) § 1355; and in the matter of Salisbury, a lunatic, 3 Johns. Ch. Rep. 347, Chancellor Kent said that a change of property from personal to real, or from real to personal, may be authorised, when it is manifestly for the interest of the infant that it should be done. Yet I confess I have not been able to find a case in any of the English books, where a sale of real estate of an infant has been ordered on the ground alone that it would be for the interest of the infant, unless connected with the further reason of paying debts, or providing a maintenance for the infant. In this country, however, where the value of real estate is not fixed and stable, but vacillates as much or more than the value of personal property, it would seem but reasonable, that a court of equity should order a sale of the real estate of an infant, where it was made manifestly to appear that his interest demanded it. But then the facts which render the sale necessary should be alleged, as well as proved, that the chancellor may clearly see that the interest of the infant would not be prejudiced, but on the contrary, promoted by the sale. Taking this rule as my guide, I can see no error in dismissing the petition. The mere fact, that the trustee and *cestui que trusts* had removed out of

the State, is not sufficient within itself to induce the court to order a sale of the real estate of the infants. It is true that the petition contains the allegation, that it would be greatly for the interest of the beneficiaries to sell the land, but the proof shows no necessity for a sale, nor any specific reason for it, except that the parties have removed from the State. The proof should go further and show the condition of the property, what it now yields, the expenses incident to the management and keeping of it in repair, and should also show, that the value of it could be invested more profitably for the benefit of the minors. Without such, or the like proof, the court could not be enabled to say, whether the interest of the infants would be benefited or injured by the sale, and unless the court can see that benefit will result from the sale, a decree of sale should not be allowed.

Whether a court of equity would decree a sale on a bill filed by Mrs. Gates, for the purpose of severing her interest from that of her children, it is unnecessary to determine. This is not the character of the present proceedings; they proceed alone on the ground that the interest of the beneficiaries would be promoted by a sale, and this must be made to appear by proof, before a decree of sale can be granted.

Let the decree be affirmed.

MOORE *vs.* THE STATE.

1. Where points are reserved and certified by the primary court as novel and difficult, this court, in the absence of a writ of error, cannot go beyond the questions presented by the reference and consider others not embraced by it.
2. A person, whose business is that of a butcher, but who sells spirituous liquors *once* in a less quantity than a quart, without first procuring license to do so, cannot be regarded as one engaged in the "business or employment" of retailing, and is not subject to the penalty prescribed by the 98th section of the Revenue Act of the 6th March 1848.
3. Has the Criminal Court of Mobile jurisdiction of an offence violative of the 98th section of the Revenue Act of the 6th March 1848?—Qu.

From the Criminal Court of Mobile. Tried before the Hon. John E. Jones, Judge.

PHILLIPS, for the plaintiff:

1. The Criminal Court of Mobile has no jurisdiction of the offence charged in the indictment. The grant of jurisdiction in the 98th section of the revenue act to *the Circuit Court*, is by legal construction an exclusion of the Criminal Court.

2. The question of jurisdiction arises upon the record, without plea. Wyatt v. Judge, 7 Porter, 37; Merrill v. Jones, 8 ib. 554; Bell v. Tomb. R. R. Co. 4 Smedes & M. 549; Leigh v. Mason, 1 Scam. 249.

3. By the 98th section of the revenue law of 1848, p. 32, it is enacted that "every person engaged in, or about, or intending to engage in any of the following kinds of *business* or *employment*, shall, &c." These words "business and employment" clearly indicate their own meaning—they are of like import with trade or profession, and denote the matter which occupies the attention and time of a party, and from which he expects to derive compensation. The proof shows that the business and employment of defendant was that of a butcher, and that his wife kept a family grocery on one of the high-ways leading out of the city. The revenue law surely did not intend to subject every one who might be called upon to sell a glass of spirituous liquor to the necessity of taking out a license, but only those whose "*business and employment*" it was to retail spirits. The opposite construction would lead to absurd results.

ATTORNEY GENERAL, contra.

1. The offence of selling spirituous liquors in less quantities than one quart without license, is complete by one single act, and does not require a repetition of the offence. Cameron v. The State, 15 Ala. Rep. 383.

2. The Criminal Court of Mobile, and the several Circuit Courts of the State, have concurrent jurisdiction. Acts 1845 and '6. See p. p. 29, § 4.

CHILTON, J.—This case comes before us upon points reserved as novel and difficult by the Criminal Court of Mobile. The counsel for the plaintiff in error insists that the

Criminal Court has no jurisdiction of the matter of the indictment, and that as consent cannot confer jurisdiction, the point may be raised for the first time in this court. However correct this may be, had the case been brought before us by writ of error, it is well settled we cannot go beyond the questions presented by the reference and consider other points not embraced by it in the absence of a writ of error. The State v. Shelton, 3 Stew. Rep. 343; Holland v. The State, 3 Porter's Rep. 292.

We briefly proceed then to consider the only point presented by the record; which is, whether a single act of selling spirituous liquor will constitute the offence charged in the indictment. The charge is "that the said Augustus Moore, being then and there a person engaged in the business of retailing spirituous liquors, to wit, in the county, &c. did then and there, retail spirituous liquors, to wit, rum, &c. in less quantities than one quart, without first procuring a license so to do, according to law," &c. The act of 6th March 1848, entitled "an act to provide for the assessment and collection of the taxes," is, as its caption imports, a revenue act. The 98th section declares, "that each and every person engaged in or about, or intending to engage in any of the following kinds of *business or employment*, within the limits of this State, shall, before he attemps to engage in or transact any such kind of business or employment, procure from the Clerk of the County Court of the county in which he intends to do such business, or follow such employment, a license for the same, which shall be operative for one year from the date thereof &c." The act then proceeds to fix upon the price of license—that for retailing in the country, or in the villages, containing less than five hundred inhabitants, being thirty dollars. The proof shows that the defendant below did not follow the business of retailing—his business was that of a butcher, and without being engaged in retailing as a business, or intending so to engage, so far as the proof discloses, he had on one occasion sold five cents worth of ardent spirits. We think it is perfectly clear that this does not subject him to the penalty provided in the act above refered to, against a person who being engaged or about to engage in the business &c. retails, &c. The terms business and employment as here used are synonimous, signi-

fying that which occupies the time, attention and labor of men for the purpose of a livelihood or profit. Business, is here used in the sense of a calling for the purpose of a livelihood. The case does not require us to express an opinion, as to whether the party may not be indicted under the previous law, notwithstanding the revenue act, for a single act of retailing without license, and hence we give no intimation upon this point. For the error we have noticed, the the judgment of the Criminal Court must be reversed and the cause remanded. As the case goes back, it may be proper to suggest in respect to the jurisdiction of the Criminal Court, that the act in express terms gives jurisdiction to the Circuit Court in respect to the penalties imposed by the 98th section, and that while other portions of the act give the Criminal Court of Mobile jurisdiction in respect to other penalties, this section does not. Does not this show that the Criminal Court was not omitted inadvertently in this section of the statute? The question is worthy of serious consideration. See Acts of '47-8, p. 15 § 43–44, p. 32, § 98.

HUCKABEE *vs.* BILLINGSLY.

1. Where a trustee in a deed, executed for the benefit of creditors, quit-claims to the grantor all his right, title and interest in the trust estate, the latter is thereby re-invested with the legal title, and a subsequent sale of it by the trustee, under the deed, conveys no such title to the purchaser as will sustain an action of trespass to try titles.

Error to the Circuit Court of Perry. Tried before the Hon. George Goldthwaite.

This was an action of trespass to try titles to certain lots in the town of Marion, and was instituted by the defendant against the plaintiff in error. The plaintiff on the trial read in evidence a deed of trust executed by John Huntington to William Howell, on the 17th September 1840, to which deed Jas. Harrell was also a party, conveying to said William Howell a number of slaves and the lots in controversy to secure the payment in the first instance of an indebtedness by Huntington to said Harrel, and in the second place of several notes

due to the Branch Bank at Mobile, on which the plaintiff, Thomas Billingsly and one Walter A. Parish were endorsers or securities. He also read a deed from Howell, the trustee, to him, for said lots, dated the 22d November 1844, and proved, in connection therewith, that said Huntington made default in paying the notes due to the bank, and that the trustee afterwards, at the request of said plaintiff and Parish, advertised and sold said lots in accordance with the provisions of the deed of trust, at which sale the plaintiff became the purchaser. The defendant offered to read in evidence a quit-claim deed executed to said Huntington by the said trustee and James Harrell on the 12th of March 1841, for the said lots, in consideration of the satisfaction by said Huntington of the debt of said Harrell provided for in the trust deed; also a deed for the lots from Huntington to one William Foster, made on the same day with the above. It appears from the record, that the purchase by Foster was founded on valuable consideration, but was made by an agent with notice of the deed of trust. The defendant held possession under Foster's title.—The court was requested by defendant to give to the jury six different charges, the third of which was, that by the deed from the trustee and Harrell to Huntington, the trustee parted with the legal title to the premises, and had no authority afterwards to sell under the deed of trust, and that such sale was void. This charge was refused by the court, whereupon the defendant excepted, and now assigns it as error.

GARROTT, for plaintiff in error:

1. By the execution of the deed in trust, to which Howell was a party, the legal title vested in him (Howell, the trustee,) and he could alien or in any manner alter the same. 2 Fonb. Eq. 166, note, (Lib. edit. 458, note); 2 Kinne's Comp. 709; Holman's Dig. T. R. 573. Difference between trusts where title *is conveyed*, and powers merely where power only is given *to convey*—similar to the distinction between a levy by a sheriff upon property under execution, and cases of sales of slaves to pay jail fees or of property to pay taxes. In the first, sheriff's sale, though irregular, will pass title to the purchaser. In the last, title will only pass where all the requisites of the law are complied with.

2. When the trustee, therefore, conveyed the property back to Huntington by the quit-claim deed, the trust as to him was extinguished, and he was estopped from selling and conveying a second time, (2 Story's Eq. 508, § 1264); consequently, his deed to Billingsly is void.

3. When the alienation did take place by the deed from Howell and Harrell to Huntington, (who was at the time of the execution of the deed in the possession of the property,) it being so intended, will amount to an absolute deed in fee simple. Coffin v. Russell, 8 Pick. 143.

4. Though the requisitions of the trust deed may not have been complied with, the irregularities in the sale cannot be inquired into in the case at bar, it being a suit at law. Brown v. Lipscomb, 9 Port. 472; Gray v. Colgin, 11 Ala. Rep. 514, and cases there cited; Tate v. Liggatt, 2 Leigh, 84.

5. Trusts are of exclusive equity jurisdiction, and as the naked legal title passed out of the trustee by his deed to Huntington for a valuable consideration, a court of law has no jurisdiction, being wholly inadequate to do justice between the parties. Justice can only be done in a court of chancery. 1 Lom. Dig. 243. Billingsly should have filed his bill, and then the rights of all parties would have been protected. 2 Story's Eq. § 960-1-2; Jackson v. Van Dalsfen, 5 Johns. Rep. 43; Jackson v. Walsh, 14 ib. 407, 412, 445; Brock v. Headen, 13 Ala. Rep. 370, 377; 12 Wend. 602; 8 ib. 426; Kennedy's Heirs & Ex'rs v. Kennedy's Heirs, 2 Ala. Rep. 572.

A. B. Moore, for defendant:

2. This trust deed is in the nature of a mortgage, with the power of sale. The maker of the deed could therefore do no act to disseize the *cestui que trust.* See 2 Kinne, 207; Cro. Ja. 660; Cro. Cor. 304; Skin. 424.

2. It is a general rule that the trustee can do no act to prejudice the *cestui que trust.* See Hill on Trusts, 317; 1 Cruise's Dig. 351, 352; 10 Bacon, 216 (late edition.) To the above rule there is but one exception, i. e. if a mere trustee be in actual possession of the estate, and convey it for valuable consideration to a purchaser, without notice of the trust, the title of the purchaser will prevail. See Hill on Trustees, 317; Cruise's Dig. 351, 352; 10 Bacon (late edit.) 216.

3. In this case the trustee was never in actual possession, and Huntington and Foster both had actual notice as well as constructive notice of the deed of trust, at the time of Howell's relinquishment, and Huntington's sale to Foster.

4. To say that the deed of relinquishment, which the trustee clearly had no right to make, conveys a title that will defeat the plaintiff below, and that a deed which he made in strict conformity with the provisions of the trust deed conveyed no title to the purchaser, involves a gross absurdity.

5. Billingsly had a continual claim as provided in the deed, which he asserted all the time, in the only manner he could. See Bac. Abr. (old edit.) 126.

COLLIER, C. J.—A trustee, it is said, is a person holding the legal title to property, under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called a *cestui que trust*.—Story on Con., 2d ed., § 296. The powers pertaining to a trustee over the trust property depend upon the nature of the trust and the terms of the instrument by which it was created; if these do not inhibit, he may reduce the trust estate into possession, and may sue or defend a suit at law in respect to it.—Chambers et al. v. Mauldin et al. 4 Ala. Rep. 477; Marriott & Hardesty et al. v. Givens, 8 ib. 694; Nicoll v. Mumford, 4 Johns. Ch. Rep. 529; Brooks v. Marberry, 11 Wheat. Rep. 97; Gray v. Hill, 10 Serg. & R. 436; Halsey v. Whitney, 4 Mason's Rep. 206; Acton v. Woodgate, 2 Mylne & K. Rep. 492; Garrard v. Lord Lauderdale, 3 Sim. Rep. 11; Small v. Marwood, 9 B. & Cresw. Rep. 300; Galt v. Dibrell, 10 Yerg. Rep. 146.

Although no one is compellable to undertake a trust, yet if the party named as a trustee intend to decline its administration, he ought to execute a *disclaimer*, or at least never interfere in the matter. Lewin on Trusts, &c. 225. It is said to be a universal rule, that a person who has once undertaken the office of trustee, either by actual acceptance or by construction of law, cannot discharge himself from liability by subsequent renunciation. The only mode by which he can obtain a release is either under the sanction of a court of equity or by virtue of a special power in the instrument creating the

trust, or with the universal consent of the parties interested in the estate. Ib. 260.

Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied: consequently, a trust to sell, even on a contingency, confers a fee simple at law, as indispensable to the execution of the trust.—Lewin on Trusts, &c. 234.

A trust estate, whether real or porsonal, may, like a beneficial estate, be conveyed, assigned, or incumbered by the trustee at law. As the dry legal estate in the hands of the trustee is affected by the operation of law, and may be disposed of by the act of the trustee, precisely in the same manner as if it were vested in him beneficially, so it confers upon him all the legal privileges and subjects him to all the legal burdens that are incident to the usufructuary possession. Thus, he may sue at law respecting the trust estate; the *cestui que trust*, though the absolute owner, in equity, is regarded in a court of law in the light of a stranger. Lewin on Trusts, &c., 244 to 248.

The *cestui que trust* may proceed against his trustee and oblige him to the execution of any particular act of duty: if, therefore, the legal estate in the hands of a trustee be assailed by a stranger, the *cestui que trust* may compel the trustee to assert his legal right. So if the *cestui que trust* have reason to believe, and can show to the satisfaction of the court, that the trustee is about to do an act that is not within the scope of the trust, he may obtain an injunction to restrain him from an unauthorised exercise of power. Lewin on Trusts, &c. 603 to 609.

Where the trustee commits a breach of trust, the *cestui que trust* may follow the estate into the hands of a stranger to whom he has conveyed it,—the rule being that the equitable right of the *cestui que trust* may be successfully asserted against any person, who is either a volunteer with or without notice, or a purchaser for a valuable consideration with notice. So he has a remedy against the trustee personally to recover compensation for the injurious consequences of his unauthorised act. Lewin on Trusts, &c., 610.

The deed of trust under which the plaintiff attempts to deduce a title, is a conveyance of the premises in question, together with some personal estate, by Huntington to Howell,

to secure the payment of certain debts due by the grantor to Harrell, and to indemnify the plaintiff and Parish against the payment of certain notes which they had signed with the grantor as his sureties. It is professedly a deed between the grantor, the trustee, and Harrell—authorises a sale after default, upon the request of either of the beneficiaries, and gives to Harrell a priority in the payment of his demands. Harrell and the trustee united in the execution of a quit-claim deed to Huntington of the *premises*, in which it is recited that they had received *satisfaction to the extent of their value.* Subsequently Huntington and wife sold and conveyed the premises for a valuable consideration to Foster, whose tenants and those claiming through him have held the possession under the assertion of a right adverse to the plaintiff or the trustee.

Although Harrell was the only beneficiary who was made a party to the deed of trust, and its primary object was to secure him, yet we have seen that there were others who had interests provided for. Harrell having joined in the *quit-claim* to Huntington, cannot charge the trustee for a breach of duty; but the plaintiff and Parish may complain, and if prejudiced by that act, are entitled to be indemnified, in the mode we have indicated would be proper, where the trustee transcends his authority. Lewin on Trusts, &c., 464. The deed, however, was valid as between Harrell, the trustee and Huntington, divested the legal estate of the trustee, and left him no interest in the premises to which he had quitted claim. Having voluntarily parted with the estate confered by the deed of trust, he could not execute the duty it enjoined, and which he had undertaken to perform; for it was essential to its performance that he should have the legal estate. This conclusion is fully supported by the work we have cited, which is little more than a compilation of the adjudged cases. Pistole v. Street, adm'rx, 5 Port. Rep. 64.

The quit-claim re-invested Huntington with the legal estate, and left nothing in the trustee—not even the naked power to convey a complete title in the grantor's name: this was inseparable from the estate with which the trustee parted. Conceding, however, that the trustee could upon the requisition of the plaintiff and Parish have sold an equitable interest, the plaintiff could not recover in the present action, because it is

indispensable to his right to recover at law that he should show a legal title in himself. This he could not do, for the reason, as we have seen, that the trustee had no such title to convey.

It is immaterial to the present case whether the agent of Foster had notice of the trust at the time he purchased; however this may be, the effect of the quit claim to divest the legal estate is still the same. The question of notice might perhaps be important in considering whether the equitable rights of the *cestui que trusts* were affected, but beyond this, we cannot perceive that it is entitled to consideration.

We are not inclined to go beyond the case before us and enquire what are the respective rights of the plaintiff and defendant in equity, upon the hypothesis that the agent of Foster purchased with notice. But we are disposed to think that the defendant is entitled to stand in the situation that Harrell occupied, and if the sale should be set aside he may claim a prior lien to the extent of the consideration that Harrell and the trustee received for their quit claim to Huntington; provided it does not exceed the amount of the sum that was due to Harrell. As to the right of the defendant to be compensated for improvements made upon the premises, this will not present a question of great difficulty when the facts are developed.

This view leads us to the conclusion, that by executing the quit claim deed to Huntington the trustee parted with his legal estate, and consequent authority to make the subsequent sale under the deed of trust at which the plaintiff purchased; consequently the third charge prayed should have been given. We will not stop to consider the other questions raised, as the conclusion expressed is decisive of the present case. We have but to add that the judgment is reversed, and the cause remanded.

SAUNDERS *vs.* COFFIN.

1. The judgments and proceedings of a court are considered *in fieri* until the close of the term at which they are entered. The continuance of a cause may therefore be set aside during the same term, and the parties required to go to trial, if the court is satisfied that no injustice will thereby be done to either of them.
2. The courts of this State cannot order a nonsuit, or compel a plaintiff to take one, without his consent.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

Douglas Smith, for plaintiff:

1. When a suit is continued and the continuance entered of record, the parties are then discharged from attendance until next term. It is erroneous during same term to proceed to final judgment. Innerarity v. Frowner, 2 Ala. Rep. 150.

2. The court cannot order plaintiff to be non-suited against his consent. Smith's adm'r v. Taylor & Seaton, Min. Rep. 75; Phillips v. Jordan, 3 Stewart, 38; Hunt v. Stewart, 7 Ala. Rep. 525.

3. The cases cited from Price and other English authorities have no application to this case, as those are based upon the ground that the plaintiff did not object to the non-suit. Here the record shews, and the judgment shews, that the plaintiff *expressly objected* to the *forced nonsuit*, and to the setting aside of the continuance. Besides, the practice in this State is different from the English practice. See authorities last quoted.

Jewett, for defendant:

1. A court may alter or correct a judgment during the same term it is rendered, and may set such judgment aside. Neil v. Caldwell, 3 S. 134; ib. 296; Johnson v. Lattimore, 7 Ala. Rep. 200. The subject of continuance is a matter of discretion with the court below. Shields v. Byrd, 15 Ala. Rep. 822.

2. A plaintiff may be forced to a non-suit when the issue is a matter of law and not of fact. Davis v. Hardy, 6 Barn. & Cress. 225; Ward v. Mason, 9 Price 291.

DARGAN, J.—The record shows that on the 27th day of December 1848, the death of McCullough, one of the defendants, was suggested, and the cause continued by the plaintiff. On the 4th day of January 1849, it being a day of the same term, the following entry was made: "This day came the parties by their attorneys, and on motion of the defendant, the continuance entered in this cause on a former day is set aside, and it is considered by the court, that the plaintiff take a non-suit, and that the defendant go hence without day and recover of the plaintiff his cost in this behalf expended, to all which the plaintiff objected."

It is contended by the plaintiff in error, that the court erred, 1st. In setting aside the continuance, and 2d, in rendering judgment of non-suit against him, he objecting to it.

It cannot be denied but that a court has the power to amend, correct, or set aside its judgments during the term at which they are rendered. Neal v. Caldwell, 3 Stewart, 134; Johnson v. Lattimore, 7 Ala. 200. During the continuance of the term, the judgments and proceedings of the court may be *said to be in fieri*, capable of being amended, altered, or set aside as justice may require, and no reason can be perceived why a continuance of a cause, that may have been improperly entered, may not be set aside and the parties required to go to trial. It may however be remarked, that the Circuit Court should not set aside a continuance already entered, and on a subsequent day of the same term require the parties to go to trial, unless it is satisfied that no injustice will be done either party. It is true that in the case of Dunn and wife v. The Bank of Mobile, 2 Ala. 152, a judgment by default was rendered, and the damages were directed to be assessed at the next term, and the cause was continued; and that afterwards, and during the same term, the damages were assessed and a final judgment awarded. This court held that this was error, because no order was made setting aside the previous continuance. Here however, the continuance was set aside, both parties being present by their attornies, and no injury appears to have resulted to the plaintiff therefrom. We cannot say that this was an error.

2. But we think the court erred in rendering a judgment of non-suit against the wishes of the plaintiff. It is the settled

practice in this State, that the court cannot order a non-suit or compel the plaintiff without his consent to take a non-suit. Hunt, use &c. v. Stewart, 7 Ala. 525; 3 Stewart, 38. It is however contended that when the issue is a question of law, and not of fact, the court may render a judgment of non-suit. We will not stop to enquire whether a court can render a judgment of non-suit without committing error in any supposed case. The record before us does not show what the issue was, or whether there was any issue. There is neither plea nor demurrer on file. A judgment of non-suit rendered by the court under such circumstances against the wishes of the plaintiff, is clearly erroneous.

Let the judgment be reversed, and the cause remanded.

WILLIAM LOCKARD *vs.* GEO. LOCKARD.

1. A defendant need not demur to a bill that is wanting in equity, but may, at any time, reach the defect by motion to dismiss.
2. When the motion to dismiss, for want of equity, is made at the hearing, no previous notice to the complainant is requisite.
3. If tenants in common agree that one of them shall occupy the joint estate, and pay to the other a stipulated rent for one half the land he cultivates, a court of law is competent to afford full redress for a breach of the contract.
4. A bill, which alleges that the complainant informed the defendant that he should pay him five dollars per acre for one half the number of acres he might cultivate, that he understood the defendant to assent to it, and that he had instituted a suit at law against the defendant for the rent, in which he had failed for want of proof, shews on its face that the remedy at law is complete, and that a court of chancery has no jurisdiction.
5. A bill, wanting in equity, can derive no aid from the answer, and is liable to be dismissed on motion, at any time, although the answer may disclose a case that would entitle the complainant to relief.
6. The allegations of a bill are to be construed most strongly against the complainant.
7. A court of chancery will not interfere with a judgment at law, unless some special ground for relief is shown.

Error to the Chancery Court of Sumter. Tried before the Hon. A. Crenshaw.

THE bill in this case was filed by the plaintiff against the defendant in error, and was dismissed by the chancellor, at the hearing, for want of equity. The facts appear fully in the opinion of the court.

HOIT, for plaintiff:

1. The objection to the bill is in the nature of a demurrer to the jurisdiction of the court, of which the complainant should have had previous notice; but none was given until the objection was made in argument. Daniel's Ch. Pl. & P. 607, 939, 1789, 1790, 1795.—1st. The rule in Chancery, (Clay's Digest, 616) which allows a motion to be made at *any time* for dismissing a bill for want of equity, refers rather to the subject matter of the bill, than to the jurisdiction of the court. The distinction is obvious—Daniel's Ch. Pl. & P. 607, and sequel; Cooper's Eq. Pl. 118. 2d. But though this rule is couched in the most general terms, yet this court has shown, that it is to be restricted to proper limits. Andrews and Bro. v. McCoy, 8 Ala. Rep. 925. 3d. By answering the bill fully and completely, the defendant waived the objection, and admitted the plaintiff's right to proceed in equity. It was too late, after going to the hearing on the merits, to raise such an objection. United States v. Sturges, 1 Paine's Rep. 526, 531. 4th. This cause was continued from term to term, and once at least, on the affidavit of the defendant, until the hearing on the 5th June 1846, when the objection was for the first time made. Duke of Leeds v. New Radnor, 2 Brown's Ch. Rep. 516.

2. There is neither any contract for rent alleged in the bill, nor any attempted to be alleged.—1st. There is no *assent* on the part of defendant *alleged*, but the complainant's understanding of defendant's assent is spoken of with *reserve*. Chitty on Con. 4 and 5; Comyn on do. 4; Comyn's Digest, "Action, Assumpsit" F. 2, A. 3 & 4; 1 M. & Selw. Rep. 557.—2d. As to the degree of certainty, "*to a common intent*," which is required to constitute a contract. Dovaston v. Payne, 2 H. Black. Rep. 530.

3. The complainant, as tenant in common, had no remedy at law for the profits from the defendant while occupying in severalty.—Coke's Litt. 172, a.—175, a. n.—186, a.—199 b.—Bacon's Ab. "Joint Tenants" &c. See Jones, et al. v. Chiles,

8 Dana's Rep. 163; Chambers, et al. v. Chambers, 3 Hawks Rep. 232, but his remedy was in equity. Graham's heirs v. Graham, 6 Munroe's Rep. 562; Wiswell v. Wilkins, 4 Verm. Rep. 137; Shermon v. Ballou, 8 Cowan's Rep. 311; 1 Story's Com. on Eq. § 466–508; Fonblanque's Eq. 156, and note b. 1st. In order to sustain a demurrer for want of jurisdiction to the whole of a bill, it must appear that no essential and substantial part of the complaint is within the jurisdiction of the court; but aside from that part of the bill which touches upon a contract, there is a complete case for equitable relief. Dimmock v. Bixby, 20 Pick. Rep. 368; Boston Water Power Co. v. Boston & W. R. R., 16 Pick. Rep. 512; Daniel's Ch. Pl. & Prac. 651–608; Story's Eq. Pl. § 443–692; 2 Maddox's Chancery, 289; Higginbotham v. Burnett, 5 Johns. Chancery Rep. 184.—2. A demurrer for want of *equity* cannot be sustained, unless the court is satisfied that no discovery or proof properly called for by, or upon the allegations in the bill, can make the subject matter of the suit a proper case for equitable congnizance. The answer and proof deny the equitable part of the bill, and sustain the rest—therefore, upon this principle, the chancellor ought to have decreed relief. Bleeker v. Bigham, 3 Paige's Rep. 246; LeRoy v. Veeder, et al. 1 Johns. Ca. 427; McLaughlin v. Daniel, 8 Dana's Rep. 184; Daniel's Ch. Pl. & Prac. 618.—3d. When a cause depends simply and entirely on the solution of a dry legal question, the proper forum for the determination of that question is a court of law. Attorney General v. Utica Ins. Co., 2 Johns. Ch. Rep. 376; but where the remedy is not clear and certain, and especially where an account for the adjustment of the subject matter of the controversy is necessary, equity will hold jurisdiction. The defeat of complainant in his suit at law, on what he supposed to be a contract, certainly renders any remedy which he might seem to have at law, very doubtful—besides, an account of the value of the profits is necessary in order to settle the matter in dispute between the parties. Weymoth v. Boyer, 1 Vesey, Jr. Rep. 417, 424; Mayor v. Falkrod, 4 Wash. C. C. Rep. 349, 205; 1 Daniel's Ch. Pl. & Prac. 609; Story's Eq. Pl. § 473; Boyce's ex'rs v. Grundy, 3 Peter's Rep. 210; Atkins v. Hill, Cooper's Rep. 288; Fonb. Eq. 12.

4. When the objection to the jurisdiction was made by the

defendant, the complainant moved for leave to amend his bill, by negativing still further his statement as to there having been a contract, and thus obviate the objection. The objection in the nature of a demurrer, was made as much out of time as this motion, and equal justice would have allowed the latter, as well as the former. Beauchamp v. Gibbs, 1 Bibb's R. 483; Hunt v. Rousmaniere, 2 Mason's Rep. 342; McElwain v. Ellis, 3 Paige Rep. 505, 440; Daniel's Ch. Pl. & Prac. 479, 480, 481, 411, and last of n. 1; Andrews & Bro. v. McCoy, 8 Ala. Rep. 925; Cooper's Eq. Pl. 334.

R. H. Smith, for defendant:

1. The promise set out in the bill, was certainly binding, and an action might have been maintained upon it. Indeed the parties having by agreement settled what chancery would otherwise have determined, the sole remedy was in a court of law. Cochran v. Carrington & Pratt, 25 Wend. 409; Thayer v. Brewer, 15 Pick. 226.

2. But supposing the promise did not oust chancery of its jurisdiction, but only gave a right of action at law as a concurrent remedy, then the familiar doctrine comes in that the court which first takes jurisdiction settles the matter.

3. If this bill then can come in, it must be, not upon any ground of jurisdiction proper, but because of some fraud or accident to the suit at law. The complainant has not made out a case to authorise the intervention of chancery. Drew v. Hayne, 8 Ala. 438; French v. Garner, 7 Porter, 549; 3 Stewart, 155; 3 ib. 165; 2 Port. 262; 10 Ala. 595; 5 Porter, 547; 2 Ala. 542; 3 Ala. 521; 8 Ala. 500.

CHILTON, J.—This bill was filed by one tenant in common against his co-tenant to have an account of the rent of a tract of land owned by the parties, and cultivated in the year 1842, by the defendant alone.

The bill charges that the parties own the land as tenants in common, and that the defendant refused to consent to a division, but excluded the complainant from a participation of the rents. That in the early part of 1842, the parties having agreed upon the manner for dividing said tract, the complainant called on the defendant to consummate the division, but he refused, and the said defendant retracted from the said

agreement, alleging that it did not suit his purpose to make a division then or for that year. Upon such refusal, the complainant informed the defendant in the language of the bill, "if he would not divide said land, he should pay him five dollars per acre for one half of the number of acres which he should cultivate of said land for the year 1842, to which your orator understood the said George Lockard to yield his assent. That your orator believing said statement and assent to constitute an agreement between said George Lockard and your orator, by which the said George, was to pay five dollars per acre rent to your orator for one half of the land he should cultivate for the year 1842, orator instituted suit in the County Court of said county to recover," &c. The complainant then avers thathe filed in the action by reason of not procuring sufficient testimony to prove the agreement aforesaid, &c.

The answer of defendant denies the agreement to pay rent, and insists that he did not exclude the plaintiff from the land, but only cultivated fifty, of one hundred acres of cleared land, leaving the other fifty acres unoccupied.

The case being submitted on bill, answer and proof, the chancellor dismissed the bill for want of equity. To reverse his decree, the complainant brings the case to this court.

The decree of the chancellor states, that after the case was brought on to be heard, and after the bill, answer and depositions had been read, and the case in part argued, the complainant moved to amend his bill, but the chancellor overruled the motion, for the reason that it came too late. What the character of the amendments proposed to be made was, we are not informed, and even conceding that the refusal to allow the amendment is a matter reversable on error, we cannot pronounce in this case, that the party has been injuriously affected by it. But it is insisted that the objection here urged against the bill, to wit, that it shows upon its face that the complainant has an adequate remedy at law, is in the nature of a demurrer, and not having been taken before the trial and before the parties had incurred all the expense consequent upon the prosecution of the cause, should be considered as abandoned.

There is no question but that the objection was proper subject matter for demurrer; but it shows at the same time that the Court of Chancery has no jurisdiction of the cause, if in-

deed, as we shall presently see, the court of law had ample jurisdiction, and could have afforded the complainant adequate relief. The bill then would be without equity, and according to the letter of the statute, subject to a motion to dismiss it *at any time.* Clay's Digest, 616, § 31. In Andrews & Bro's v. McCoy, 8 Ala. Rep. 920, 925, it is said, "a bill which does not allege a cause of action, cannot be entertained, and there is no sensible distinction between the absence of such necessary allegations showing a cause of action, and an alternative admission that no cause of action exists, as the bill must be construed most strongly against the pleader." In that case, one of the alternative averments in the bill, viz, that the defendant in chancery held certain notes in payment of pre-existing debts, showed that the plaintiff was not entitled to recover, but as upon the other alternative he was entitled to the relief sought, this court held, that as the defendant in the bill had taken no objection to the bill in the court below, he could not after a final decree raise the objection for the first time in this court.

It is manifest the case above refered to, and to which we are cited as an authority to show that the defendant in this case could not take advantage of the defect in the bill at the final hearing, does not sustain that position. In the case at bar the defendant did raise the objection, and it was sustained by the chancellor. In the case of Andrews & Bro. v. McCoy, *supra*, the objection was considered as waived, not having been taken in the court below, and for that reason, was disallowed in this court.

The authorities cited by the counsel for the plaintiff in error show very clearly, but for the 31st rule of chancery practice, which we have adopted, (Clay's Digest, 616,) the defendant below, not having availed himself of the objection by demurrer, could not, upon the hearing, have insisted upon it as ground for dismissing the bill—according to the generally received practice in courts of equity, if the defendant had demurred, and had embraced the same matter in his answer which is covered by his demurrer, the effect of the answer would have been to have overruled the demurrer. Story's Eq. Pl. § 465, and authorities cited. Our rules of practice are very different. In this State, the defendant may embrace

all the matter of his plea and demurrer in his answer, and is entitled to the same benefit thereof as if the same had been pleaded. Clay's Digest, 351, § 36; Crawford, et al. v. Childress, 1 Ala. Rep. 482. Neither is it required to file a replication to an answer, but in all cases where the answer shall have been filed ten days before the sitting of the court, or the bill is taken *pro confesso* for want of an answer, the cause regularly stands for trial at the next sitting of the court. Ib. § 38. Inasmuch as submitting to answer is not under the influence of our statutes a waiver of the party's right to object to the want of equity in the bill, and as such objection may be made at *any time*, even though the party has failed to answer, and the bill has been taken for confessed against him, it is very certain that he did not, in this case, lose his right to make the motion to dismiss at the hearing—Freeman et al. v. McBroom, 11 Ala. Rep. 943; and further, that as the statute fixes upon the term when the cause is to be tried, no notice is required to be given the opposite party of the motion to dismiss. He is presumed to be in court by his counsel, who in this case, as the decre shows, was actually in court, and argued the cause. The question then recurs, does the bill upon its face show equity—if it does not, under the principles above laid down, the chancellor correctly dismissed it.

Conceding that the court of chancery has jurisdiction to compel an account and to decree compensation between tenants in common of real estate, where one has received of the rents and profits more than his share, and refuses to account, still there cannot exist a doubt, where the parties contract for a several occupation of the land, and agree that the occupant shall pay therefor to his co-tenant a stipulated sum, that a court of law has ample jurisdiction to award damages for a breach of the contract, for this amounts to a temporary severance of their tenancy in common, and the party who disposes of his interest in the term to his co-tenant is as much entitled to his action to recover the price, as he would have been had he sold the entire interest to him. In the case at bar, the complainant informed the defendant that he should pay him for the occupation during the year 1842, the sum of five dollars per acre, for one half the number of acres he, the defendant, should cultivate during that year, and complainant *understood*

the defendant to consent thereto, and to enforce that contract the complainant instituted his action at law, but failing to procure sufficient proof of the contract, was defeated. He does not aver in his bill, that he was mistaken as to the existence of a contract, but fails in any manner to explain these expressions so as to negative the idea of its existence. It is then too obvious to require argument or illustration that we are bound, from the expressions used, to infer a contract existed. If the complainant understood the defendant to yield his assent to his proposition to pay him for half the land cultivated, five dollars per acre, and leaves the matter of the contract standing alone upon this allegation without any explanation, how is it possible for the court to come to a different conclusion upon a motion to dismiss the bill for want of equity, which assumes that the allegations of the bill are true? It is not sufficient that according to the case made by the answer of the defendant, the complainant is shown to be entitled to equitable relief. He must make out his title to relief by his bill, and if the allegations therein contained, when admitted as true, fail to make out such a case as comes within the jurisdiction of the court, or entitles the complainant to some relief, his bill is liable to be dismissed at any time upon motion for want of equity. The allegations must warrant the decree, as well as the proof. 9 Porter, 211; 1 Ala. Rep. (N. S.) 330; 3 ib. 421; 6 ib. 518. Was there any doubt in regard to the meaning or construction of the allegation above alluded to in this bill, the general rule which requires it to be construed most strongly against the pleader, at once puts the question to rest. See Andrews & Bro. v. McCoy, *supra*. The effect then of this averment is not only that the complainant has his remedy by action at law, but he goes on further to show that he has invoked the aid of the law court and has been defeated, not upon the ground that no contract existed; but because he did not procure sufficient proof of it. This court has uniformly decided that the Chancery Court will not overhaul judgments at law, unless upon some special equitable ground being shown for its interference, such as fraud, unavoidable accident, and the like.

Our conclusion is, that the decree was, under the circumstances, entirely correct, and it is therefore affirmed.

WILLIAMSON *vs.* THE STATE.

1. An indictment, under the statute of 1848 (Acts 32, § 98,) for keeping an establishment for the sale of confectionary, &c. without license, is not demurrable, because it was not prefered at the instance of an informer.
2. A witness, sworn in support of an indictment founded on a statute, which, in case of conviction, gives one half the penalty to the informer, is not to be considered the informer, from the mere fact that he is the only witness in the case.
3. On the trial of an indictment for keeping an establishment for the sale of confectionary, &c. without license, evidence that the title to the premises, on which the business is carried on, is in a trustee for the use of the defendant's wife, is wholly irrelevant and properly excluded.
4. If a married woman commits a misdemeanor with the concurrence of her husband, the husband is liable to indictment.

Error to the Criminal Court of Mobile. Tried before the Hon. John E. Jones, Judge.

THE facts of this case appear fully in the opinion of the Court.

RAPIER, for the plaintiff in error:

1. The indictment was defective, and the demurrer to it should have been sustained. The statute contemplates that there must be an informer, and that his name must appear as such in connection with the indictment. The language of the statute excludes the idea of an indictment to be found in the ordinary way. So does it exclude a proceeding by information in the technical sense of the term. See pamph. Acts, 1848, p. 32, § 98. An indictment may be defined to be an accusation at the suit of the State, by the oaths of the grand jurors returned to inquire of all offences in general in the county. 2 Hawk. 287. An information, in ordinary legal acceptation, is an accusation not found by the oaths of the grand jurors, but is the allegation of the officer who exhibits it. 2 Hawk. 357, § 4. It is laid down in the old books, that where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, information, &c., with-

out mentioning an indictment, an indictment will not lie, because the statute impliedly excludes that mode of proceeding, &c. 2 Hawk. 289, 290; see also 2 Hawk. 370, § 20. In view of these principles, the proper construction of the statute is that the accusation must be by the oaths of the grand jurors: but that they are not to make inquiry about such offences as the statute has reference to, unless some one voluntarily comes before them as an informer. And it follows that the indictment must have the name of some one as informer appearing in the body of it, or by endorsement. How can it appear to the court that there is an informer, or how can the informer recover his portion of the penalty, unless he appears in such character in connection with the indictment?

2. If the witness, Williams, on whose testimony the indictment was founded, might be regarded as the informer, then he was an incompetent witness. 2 Stark. Ev. 775.

3. It was error to exclude the trust deed made to Brooks for the benefit of the defendant's wife. This was evidence tending to show that the wife, who was the real offending party, was acting without the coercion of her husband, and not for him, and that it was not he who was keeping the shop.

4. The charge of the court was erroneous. The law visits upon the husband the consequences of the wife's offending, when the latter acts or is presumed to act under the coercion of the former. In inferior misdemeanors, the wife is responsible for her own acts, especially if she is the chief actor, and there is no coercion of the husband. See 1 Russ. on Crimes, 20, 21; 1 Hawk. 5, §§ 12, 13; 2 Strange's Rep. 1120, Rose v. Crofts.

5. The judgment was not warranted by the law and the facts of the case. There is no judgment of conviction, but only of forfeiture. 2 Hawk. 389, § 76. Secondly, the judgment in favor of the State is for the whole penalty, whereas it should be but for a moiety. 2 Hawk. 389, § 76.

Baldwin, Attorney General, for the State:

1. The witness, Seaborn Williams, was properly admitted to testify. He was no informer, and could have no interest in the case. The fact that the grand jury called him before them cannot make him an informer, for no one can be made an in-

former against his will, but he may be made a witness against his will.

2. The deed of trust was foreign to the case, and properly excluded by the court.

3. The most important point in the case was the charge of the court, which was "*that if a married woman kept a shop with the privity and consent of the husband, it made him liable for the consequences*" of keeping the same. In certain cases, a wife is supposed to act under the coercion of her husband, whenever she commits a crime in his presence. 1 Russ. 19, top page; Roscoe, 784; Arch. 16. If she commit a crime in the absence of her husband, though by his command, she is answerable for it; but even then, if the offence be committed by concurrence of the husband, and he be a privy to it, he may be indicted. 1 Russ. 21. For all misdemeanors by the wife, the husband and wife may be jointly indicted. Rex v. Ingram, 1 Salk. 384; 4 Bl. Com. by Ryland, 29, n. 10 and 12. In New York, the husband is answerable for a forfeiture on account of his wife retailing without license in his absence. Hasbrouk v. Weaver, 10 Johns. 246.

The judgment of the court was right. It was the province of the jury to ascertain the guilt of the plaintiff in error, and the law fixed the punishment.

CHILTON, J.—The indictment charges the defendant with keeping an establishment in the county of Mobile, on the first day of June 1848, for the sale of confectionary, cakes, candies and fruits, without first procuring a license so to do according to law. The defendant was found guilty, and the court entered judgment that he be fined thirty dollars, that being three times the amount of the price of license required to be paid by persons engaged in that business.

Upon the trial, the defendant demurred to the indictment, because it did not disclose that there was an informer, insisting that as the statute gave one half of the penalty to the State, and the other to the informer, it must appear who the informer is. Acts of 1848, p. 32, § 98.

The defendant also objected, upon the trial, to the examination of Seaborn Williams, who was marked upon the bill of indictment as a witness, and who was the only witness ex-

amined by the grand jury. This witness stated that he was not the informer, and was allowed to testify by the court. The defendant also offered in evidence a deed, dated in 1846, conveying the premises on which the establishment was located to one Brooks, in trust for the defendant's wife, and proposed showing that she kept a similar establishment on the place from 1836 down to the present period, when the indictment was found, and managed it principally herself, the defendant having another occupation calling him from home in the day time, and only being occasionally at the shop, and that the wife was always there, in the absence of her said husband, managing the shop. The court excluded the conveyance, and instructed the jury that the fact that the married woman kept a shop with the privity and consent of the husband made him liable for the consequences of keeping the same. The defendant also objected that the State was not entitled to judgment for treble the price of license, since the statute gave one moiety thereof to the informer, which objection was overruled, and judgment entered for the entire sum. The several points having been refered by the Judge of the Criminal Court to this Court, as novel and difficult, we proceed to notice them in their order.

1. The clause of the statute under which the indictment was found, being a portion of the act to provide for the assessment and collection of taxes, declares that each and every person engaged in or about, or intending to engage in any of the following kinds of business or employments, within the limits of this State, shall, before he attempts to engage in or transact any such kind of business or employment, procure from the clerk of the County Court of the county in which he intends to do such business or follow such employment, a license for the same, which shall be operative one year from the date thereof: And in default of procuring such license, the person or persons doing such business or following such employment shall be liable to pay treble the sum required to be paid for such license, *to be recovered by indictment on three days' previous notice, by motion of the solicitor for the circuit in which the county is situated, before the Circuit Court of the county in which the business or employment is alleged to have been followed—one half to the use of the informer, and the other half to the use of the*

State. The statute then provides that the license for keeping a confectionary or establishment for sale of confectionary, cakes, candies or fruits, shall be granted for ten dollars.

The statute, so far as it relates to the remedy, is somewhat unique and difficult of comprehension. It requires that the penalty shall be recovered by *indictment*, upon three days' previous notice, *by motion of the solicitor* before the Circuit Court, &c., one half to the use of the *informer*, the other half to the State. It is insisted, that the statute contemplates an informer, and that his name must appear as such in connection with the indictment. We do not agree with the counsel, that the indictment was demurrable, because no informer's name appears upon it. A just construction of the act would not allow the right of the State to punish those who seek to avoid her revenue laws, and to recover from them the penalty imposed, and which is a compensation for the loss of revenue consequent upon the failure of the defendant to obtain license, to depend upon the fact whether any one would become an informer in the sense contended for. Were such the law, a large portion of the public revenue might go uncollected, as it rarely happens that the small sum allowed to informers is sufficient to stimulate them to set on foot such prosecutions. The State receives the penalty, to-wit, treble the price of the license, one half to the use of the informer, if there be one, and if no informer claims the moiety, the State may retain the whole. Regarding the prosecution as a means of recovering the penalty, we see no reason why the doctrine applicable to *qui tam* actions should not apply, in respect to which Judge Blackstone says: If the king commence the action, he shall have the whole forfeiture. 2 Bla. Com. 162—citing 2 Haw. Pl. Cr. 368. The defendant cannot complain that the State, instead of the informer, takes the other moiety. It is the same to him, as the penalty is not thereby incurred, and he is deprived of no right which he could assert, were the name of an informer endorsed upon the indictment. The demurrer was therefore properly overruled.

2. The witness, Williams, cannot be regarded as the informer, merely because he was sworn as a witness. He swears that he was not the informer, and was therefore properly allowed to testify, as he was entitled to no portion of the

recovery, and consequently had no interest in the prosecution.

3. It is shown that the husband and wife lived together on the premises where the establishment was carried on. It was a question wholly foreign from the matter in issue, whether the premises belonged to the husband, the wife, or a third person. The question in issue was, whether the defendant carried on the business of selling confectionary, cakes, candies, fruit, &c., without obtaining license; if he did, it was wholly unimportant whether it was upon his own or his wife's land. So that we cannot conceive how he could have been prejudiced by the exclusion of the deed of conveyance, showing that the title to the premises, on which the establishment was situated, was in one Brooks in trust for the benefit of Mrs. Williamson.

4. There is no error in the charge of the court, that if the wife carried on the establishment with the privity and consent of the husband, he was responsible for the consequences. If she was acting with his privity and consent, she was acting for him, as much as if he had employed any one else to superintend the sales, and he was entitled, by virtue of his marital relation, to her earnings; he was also, as the proof informs us, at the shop occasionally, and although otherwise employed during the day, returned home at night. Under such circumstances, we think no case can be found which holds that the husband is not liable. Croft's case, in Strange 1120, decides that the wife may be convicted of selling gin against the injunction of the 9th Geo. 2, c. 23; but she acted without the company or coercion of her husband, and was alone the offender. There can be no doubt of the husband's liability, when the wife acts with his concurrence. 1 Russell, 17, *et seq.*; 10 Johns. Rep. 246.

There is no error in the judgment, and it is consequently affirmed.

RANSOM, ADM'R. &c., *vs.* QUARLES.

1. The filing of a certificate of the clerk of the court in which a judgment was rendered against an insolvent estate, substantially describing the judgment, is a sufficient compliance with the statute requiring claims to be filed, and it is competent for the creditor, after objection is made, to produce a transcript of the record.
2. An error, from which no actual injury results, is not a ground of reversal.
3. Where a clerk's certificate, substantially describing a judgment, is filed by a creditor as evidence of his claim against an insolvent estate, the omission to specify the costs is immaterial, as they are merely consequential to the judgment.

Error to the Orphans' Court of Marengo. Tried before the Hon. Jas. A. Young, Judge.

THE estate of the plaintiff's intestate having been duly declared insolvent, the defendant in error as evidence of a demand held by him against the estate, on the same day, filed with the clerk a certificate of the clerk of the Circuit Court of Perry county, stating that a judgment was rendered on the 19th May 1843 in said court, in favor of the defendant against the plaintiff in error for $3630 44, and appeared on the record as still unsatisfied. The plaintiff in error at the instance of another creditor of the estate filed objections to the allowance of the demand, whereupon an issue was made up, and by consent tried by the court without a jury. The defendant in error offered in evidence a transcript of a judgment, corresponding in all respects with that described in the certificate, except that it was for $3620 44 damages and $73 70 costs of suit. The plaintiff in error objected to the introduction of this transcript as evidence of the variance. He also objected to the allowance of the demand or any part of it, because no *legal evidence* of it had been filed in six months after the decree of insolvency, and to the amount of costs on the same ground. This item of costs had been brought in by the administrator as a credit and rejected. The court overruled each and all of the objections and rendered judgment for $5184 12, the supposed full amount of principle, interest and costs then due. This is now assigned as error.

HENLY & VARY, for plaintiff in error.

No counsel for defendant.

COLLIER, C. J.—In Rowdon v. Young, adm'r, 12 Ala. Rep. 234, the question was whether the filing of the copy of a note which evidenced a claim against the insolvent estate of the defendant's intestate, was a compliance with the statute, and authorised the production of the original after exception was taken. It was said by the court, that "it is perfectly certain, that the note or bill single is not the debt, but merely furnishes proof of it, and that the destruction of the evidence would not extinguish the liability to pay. We have seen that the affidavit which the act requires may be made after an objection is taken for the want of it, and why should not other proof of the claim be admitted in the same manner? The copy of the bill single with the affidavit is quite as explicit as the most formal declaration; and where an action is instituted in the ordinary mode, the plaintiff need not file the evidence of his demand, until called for by the defendant, or it is required to entitle him to a verdict or judgment. Why should not the same indulgence be tolerated in a proceeding such as that now before us? Besides, does not the statute in directing pleading to be made up, and an issue tried, contemplate the introduction of other proof by either party (where it is necessary) than the claim as filed?" In Rutherford's adm'r v. The Br. Bank at Mobile, 14 Ala. Rep. 92, this court was of opinion that it was not necessary to file a note or bond against an insolvent estate in the office of the clerk of the Orphans' Court, but the statute was sufficiently complied with, by filing a copy or substantial statement of the claim: *Further*, if the claim was left with the clerk within the time prescribed for the purpose of having it filed, the omission of the clerk to register it with others of a similar character could not prejudice the creditor.

If the principle of the cases cited is to be followed, it is perfectly certain that it was not necessary for the defendant in error to file a transcript of the record and judgment in the cause which he insisted showed that he was a creditor of the intestate's estate. A substantial recital of the amount of the

judgment, the time when it was recovered, &c., was quite sufficient to give to the administrator all the information that was necessary, unless he proposed to make defence against the claim, in that event he could file exceptions and call for an authenticated transcript. In fact it would be the duty of the Orphans' Court, *mero motu*, to require the production of legal evidence of a claim in such cases, where a mere memorandum or copy has been filed. The certificate of the clerk of the court in which the judgment was rendered, reciting the essential facts, is altogether as regular and effectual, as if they were embodied in a statement made by the creditor himself.

The discrepancy between the certificate of the clerk, and the transcript produced, is not a fatal objection to the allowance of the claim. There is no contradiction, except as to the amount of the judgment; the parties, court by which, and time when it was rendered, are all correctly stated, so that if it was necessary, the creditor might substitute another certificate or statement of his demand in conformity to the transcript. There would certainly be no stronger objection to the allowance of such an amendment than applies to a defective writ, declaration, or other pleading.

True, the decree professes to allow to the defendant in error the full amount of the claim stated in the certificate with $73 70 and interest on these sums, yet the amount of the judgment including the costs with interest at the time the decree was rendered by the Orphans' Court, distributing the assets between the creditors, exceeded the sum estimated as the amount of the claim. Now although the court may have proceeded upon a hypothesis prejudicial to the estate of the intestate, yet as no injury resulted in fact, the error was merely speculative and does not warrant a reversal of the decree.

It is insisted that as the claim filed did not indicate that the defendant in error sought to recover the costs which were taxed on the judgment recited in the certificate of the clerk, the Orphans' Court could not take them into the account and add them to the damages recovered, so as to swell the amount of the claim. The costs were merely consequential, and the certificate is sufficiently comprehensive to show that the demand was for whatever the judgment entitled the creditor to collect by execution. If necessary, it was clearly competent

for him to have amended his claim as exhibited, so as to embrace the costs *eo nomine*. Although the Orphans' Court may have refused to credit the administrator with the amount of the costs, it was clearly competent to have allowed them as a part of the claim of the defendant in error. There may have been reasons which justified their rejection in the one case that do not apply to the other, or if the court made an incorrect decision either with or against the consent of the administrator, the creditor was not bound to acquiesce, and the court itself might have decided correctly for the creditor. It is enough however upon this point, that the record does not show an available error.

What we have already said, furnishes an answer to the questions attempted to be raised by the form of the issue. Without stopping to enquire whether, as the Judge was by consent of parties substituted for the jury, his decision upon the issue should not be regarded both as a verdict and judgment, we are satisfied upon the facts and the law as we have stated it, the result is correct.

It remains but to add that the decree of the Orphans' Court must be affirmed.

GLOVER *vs.* GLOVER.

1. Where a husband abandons his wife without just cause, and casts her upon society destitute of the means of subsistence, a Court of Chancery, as an original ground of equity, will entertain a bill filed against him for alimony.
2. The Chancery Courts of this State have no jurisdiction of a bill filed against a non-resident defendant, unless "the ground or cause of action, or transaction," on which the bill is founded, occurred within its limits.

Error to the Chancery Court of Sumter. Tried before the Hon. A. Crenshaw.

R. H. Smith, for plaintiff in error:

1. The wife may maintain her bill upon the abandonment and ill usage of her husband as a bill standing alone on this

ground, and not incidental to a bill for divorce or the execution of a contract to settle. Almond v. Almond, 4 Rand. 662; Purcell v. Purcell, 4 Hen. & Mun. 507; Watkyns v. Watkyns, 3 Atk. 96; Williams v. Callow, 2 Vern. 752; Duncan v. Duncan, 2 Ves. 396, and cases cited; Prather v. Prather, 4 Des. 83; ib. 183; Butler v. Butler, 4 Lit. 202; Thornberry v. Thornberry, 2 J. J. Marshall, 324; Knight v. Knight, 2 Haywood, 101. Modern decisions in England involve the question in doubt there, if they are not averse to the doctrine contended for; but the question has not been decided in Alabama, and reason and justice are in favor of the right. Indeed the right of the wife to file her bill may be deduced as a legal result from the marriage obligation. Suppose the wife have good cause for divorce, but in view of circumstances (many of which of the strongest character and weight might be mentioned) she shrinks from exhibing her bill for divorce—shall it be said she loses the right of support—a *right incident to an existing marriage relation*, not springing up *oa a dissolution of the tie*. It would seem that the right to the support is strongest while the relation subsists, and he, and he alone is derelict, yet by our own decision on a divorce of the husband for adultery of the wife, alimony will be decreed to the wife, and can it be said that he cannot *be compelled* to support his wife while she is innocent?

2. Nor can it be objected that she is a resident of Virginia, and he has gone to Tennessee. He cannot evade the right to screen himself from discharging the duty by deserting the State of Virginia, placing his funds in Alabama and taking himself to Tennessee. All this was but a fraudulent contrivance to defeat the wife. Besides, I know of no principle which should exclude the wife from suing in our courts. The money in this case should have been ordered to be put at interest, and the interest paid the wife until the husband shall be willing to receive her back, and treat her properly.

F. S. Lyon, for defendant in error:

1. If the bill was filed for *alimony* on the ground of ill usage and abandonment on the part of the husband, it cannot be sustained. The complainant was a citizen of Virginia, and the defendant of Tennessee, where the bill was filed, and

there is no ground disclosed upon which the court below could take jurisdiction of the cause.

Under our laws the complainant had no right to file a bill in this State for divorce, either from the bonds of matrimony or from bed and board—*alimony* is but an incident to divorce from bed and board, and cannot be recovered, except in case of a judicial separation of the parties, else how could the recovery by the wife be protected or enjoyed by her. If allowed to recover alimony without a divorce from bed and board, whereby she would be placed beyond the control of the husband, and within the protection of the law, the recovery when reduced to money or property would, by operation of law, become the husband's.

It may be that the allegations and the proof on the part of the complainant were sufficiently strong to authorise a divorce from bed and board, but the complainant was not a citizen of this State, and could not therefore file her bill for a divorce in our courts. The bill contains no prayer for a divorce and hence no decree for *alimony* could be made upon it. 2 Story's Com. on Eq. 647, 648; Ball v. Montgomery, 2 Ves. 195, 196; Head v. Head 3 Atk. 550; Legard v. Johnson 3 Ves. 359; Clancy on Married Women, 13, 5 chap. 9 p. 549, 550; 4 Russell, 428.

CHILTON, J.—This was a bill filed by the plaintiff in error against the defendant Bradley S. Glover, her husband, to obtain a decree for alimony. The bill, which is fully sustained by the proof, alleges that the parties were married and resided for many years in the State of Virginia, in which State the complainant still resides; that the defendant treated her most cruelly, and drove her from his residence, forbiding her return, and that notwithstanding he has property adequate to their mutual support, he failed to make any provision for her maintenance, but absconded from the State of Virginia, leaving her entirely dependent and destitute, and a charge upon her friends. It is shown that the defendant has funds in this State, out which the complainant prays that an allowance may be made to her, and the persons who have the funds are brought before the court. It further appears by an affidavit in the record that the husband resides in the State of Tennessee.

The chancellor was of the opinion that the complainant was not entitled to the relief prayed, and dismissed the bill.

The question involved is one, which, so far as I am advised, has never been decided by this court, and I have consequently bestowed upon it all the consideration which its delicacy and importance demand, and which my time would allow.

I think it is pretty clear from an examination of the English authorities, especially those of more modern date, that the claim of the complainant cannot be sustained, if they are to be followed. In that country the courts of chancery have generally refused to entertain a bill for alimony, unless the parties have entered into an agreement that it should be allowed, or a sentence of separation *a mensa et thoro* had been previously passed by the ecclesiastical court. In the case of Head v. Head, 3 Atk. 547, to which we are refered by the counsel for the defendant in error, Lord Hardwick says that he could find no decree to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even then unwillingly. This dictum seems generally to have been followed, but it may be remarked that this learned chancellor had overlooked the cases in 2 Vernon, of Oxenden v. Oxenden, 493, where the husband by his cruelty having forced his wife to separate from him, the court of chancery decreed the interest of six thousand pounds, a portion settled on the husband for life, to be paid to her, for her separate maintenance until cohabitation; and that the subsequent case of Nickolls v. Danvers, 571, makes a similar provision for the wife, who having been cruelly treated by the husband separated from him, and filed her bill, praying that £3000, which came to her from her deceased mother's estate, might be decreed for her own use and maintenance. So also in Williams v. Callow, ib. 752, the court decreed the interest of a trust bond given for the wife's portion, to be paid to the wife for her separate maintenance, by reason of the drunkeness and extravagance of the husband, and his rude and abusive treatment of his wife. In these cases there was neither a divorce nor an agreement to live separate. See also Lasbrook v. Tyler, 1 Chan. Rep. 24, and Watkins v. Watkins, 2 Atk. 96. In Ball v. Montgomery, 2 Ves. Jr. 195, Lord Loughborough says, he did not recollect any such cases as were cited to him

from Vernon, and he asserts the broad doctrine that a married woman should not be a plaintiff in a suit in equity for a separate maintenance, and that no court, not even the ecclesiastical court, has any original jurisdiction to decree such separate maintenance, but it can only be awarded as incidental to some other matter. For example, by the Chancery Court, when the wife applies upon a supplicavit for security of the peace against her husband; (but this ground of equitable interposition is denied by the modern writers—Roper, Husb. & Wife, 309; Clancey's Rights, &c. 454–5) and by the ecclesiastical court, when the wife libels the husband *propter sævetiam*, or by reason of his desertion, ib. 549. Mr. Fonblanque in his treatise on equity, vol. 1, p. 94, maintains the doctrine "that a wife may have a separate estate from her husband as by agreement or by decree for ill usage, or alimony; ib. 104, 105, where the cases are collated. The doctrine of Ball v. Montgomery, *supra* has been generally followed, as settling the law in England, (see Stones v. Cook, 7 Sim. 22, and Vandergucht v. De Blaquise, 8 ib. 315,) but seems hardly reconcilable with the case of Duncan v. Duncan, 19 Ves. 394, which seems to favor a different doctrine. So stands the law in England, and since her learned chancellors have not been able to reconcile their own decisions, we feel that we shall not be wanting in respect for them in adopting a rule of decision for ourselves, which we conceive to be more consonant with an enlightened equity, and with the fundamental principles and maxims upon which the jurisdiction of our courts of chancery is based.

No one will deny but that the husband is bound by the strongest obligations, resulting not alone from the contract of marriage, but founded upon the highest moral consideration, to support his wife. And if it be true that the law, as well as enlightened conscience, creates this obligation, and no court can enforce its performance or compensate for its most cruel and flagitious violation, then indeed has one class of cases been found, which falsifies the boasted maxim, "that for every wrong there is a remedy, and for every injustice an adequate and salutary relief." The learned commentator upon equity jurisprudence, Mr. Justice Story, after reviewing the various adjudications of the English courts, remarks, "In America,

a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity, and it has been held, that if a husband abandons his wife and separates himself from her without providing any reasonable support, a court of equity may, in all such cases, decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case," and then adds his own view, "*that there is so much good sense and reason in this doctrine that it might be wished that it were generally adopted.*" 2 Story's Equity Jurisp. § 1423,—4th edition.

The case referred to in support of the text, is Purcell v. Purcell, 4 Hen. & Munf. 507, which fully sustains it. In that case the bill was filed to obtain alimony: It set forth the marriage of the parties—that without any impropriety on the part of the wife, the husband had separated himself from her without providing her the means of support; that with all her endeavors, she had often been without the necessaries of life, and that his knowledge of the fact instead of exciting even compassion, had caused only contempt and insult, and that she had been compelled to support upon the charity of others. Wherefore she prayed a comfortable support to be decreed her out of her husband's estate, which was adequate, and for general relief. The chancellor said, "if the jurisdiction of this court were now to be settled upon English precedents, there might be some doubt about the question, from the cases as brought into one view by Mr. Fonblanque, but I shall leave this clashing of English judges to be reconciled among themselves, and take up the question upon first principles." He then proceeds to derive the jurisdiction of the chancery court over the subject of alimony, not as incidental, but as an orinal ground of equity, in cases where the right to a maintenance exists, and the law affords no remedy, and to award an inquiry into the master as to the defendant's property; which being reported, he decreed an annual allowance of three hundred dollars to be made to the wife, with liberty to each party to apply to the court to increase or diminish it, as circumstances should in future make it proper, which provision should continue no longer than he is willing to restore her to the comforts of bed and board, and give satisfactory assurance for her

enjoyment thereof. To this case is appended a note, which states: "after the decision of the case by the chancellor, the defendant's counsel made application to the Judges of the Court of Appeals for leave to take up the case to that court, by appeal, which they *unanimously refused*, and expressed themselves perfectly satisfied with the decree upon the merits; so that the doctrine of alimony may now be considered as settled."

The decisions in the State of South Carolina have been in conformity to the doctrine settled by the Virginia Courts in Purcell v. Purcell. In Jelineau v. Jelineau, 2 Des. 45, the court interfered to protect the wife, who had been compelled by the ill treatment of the husband to leave him, although he made an offer to receive her back again, it appearing the offer was made merely to avoid the maintenance sought by the bill and to elude the justice of the court. She was decreed to be entitled to maintenance according to the fortune of the husband, whose circumstances were directed to be ascertained by the master. The chancellor says, if there were no precedents for such proceeding, the court would make one. So also in Prather v. Prather, 4 Des. 33, the very learned and lamented chancellor (Desaussure,) summoned the energies of his powerful intellect to sustain the doctrine that if the wife is ill used, and driven from home by her husband, she is entitled to the protection of the court in decreeing her alimony proportioned to the husband's fortune, to be paid annually to the wife, until the husband should receive her home and treat her kindly.—See also Devall v. Devall, ib. 79, 94, 167. The decisions of Kentucky are perhaps to be refered to the statute of that State, passed upon the subject of alimony in 1800; but in Lockridge v. Lockridge, 3 Dana 28, it is said by Robertson, C. J., that without the statute, we should not doubt the power of the chancellor, in this State, to decree alimony for such cruel treatment by the husband as would render a separation proper.—See also Butler v. Butler, 4 Litt. 201; 4 Rand. 662; 2 Hayw. 101.

I will, however, not lengthen out this opinion by reference to futher authority, since in my judgment, upon principle, the doctrine contended for is placed by the American decisions above cited upon solid and impregnable ground. But although

in our opinion, the court of equity has original jurisdiction over the subject of alimony, we are nevertheless constrained, by our view of the law, in respect to another point involved in this cause, to deny the relief sought by the complainant's bill.

The husband is a non-resident of this State, and the complainant shows by her bill that she resides in the State of Virginia, in which State the cause of complaint originated. The question then comes up, does the mere fact that the husband has debts due him from citizens in this State, give the court of chancery jurisdiction? We will not undertake now to determine whether, under the act of February 1846, (see pamph. Acts 17) the claim of the complainant is such an "indebtedness" as will entitle her to relief there provided for non-residents having effects in this State. The bill was not filed under that statute, does not comply with its requisitions, and the complainant can therefore derive no benefit from it, even though it authorised the remedy which she seeks, and upon which we desire to be considered as expressing no opinion.

In the heirs of Holman v. The Bank of Norfolk, 12 Ala. Rep. 369, 428, it was held that the proper construction of the act, giving courts of chancery jurisdiction of non-resident defendants, did not authorise proceedings against a non-resident on constructive notice by publication, unless the cause of action, or the transaction on which the bill may be brought took place within the State.—See Clay's Digest 353, § 58. The proviso to the act declares, "that it shall not be so construed as to authorise proceedings against persons residing out of the State, unless the ground, or cause of action, or transaction on which the bill may be brought, took place within this State." In the case above cited, it was said that it was never intended that our citizens should make contracts or acquire rights in other countries and then compel the non-resident defendants with whom they contract to come here and litigate the matter, still less could it be tolerated that when two foreigners have entered into a contract, one should compel the other to come to this State and litigate his title, merely because the subject matter of the contract was here.

This view is conclusive upon the right of the complainant

to maintain her bill in this State against her husband, who resides in the State of Tennessee. We confess this is a hard case upon her, and not without some reluctance, pronounce that the decree of the chancellor must be affirmed.

COCHRAN & ESTILL *vs.* CUNNINGHAM'S EX'R.

1. It is well settled, that in an action at law by partners all must be entitled to recover, or the action cannot be maintained: When, therefore, one of two partners, either before or after the dissolution of the firm, does an act which bars him, it will equally preclude the other from bringing a suit in the partnership name.
2. In a suit at law by partners, the admission of one of them, after the dissolution of the firm, that he has no right of action, is competent testimony in bar of the suit.
3. Where money is received to the use of a firm, and suit is instituted for its recovery against one of the partners alone, the other, being liable to his copartner for contribution in the event of a recovery, is an incompetent witness for him.

Error to the Circuit Court of Talladega. Tried before the Hon. N. Cook.

The facts of this case may be thus stated: The plaintiffs, as attorneys and partners in the practice of law, had performed various services for the Bank of Rome, and for which the bank was indebted to them. In the settlement of a claim they held on one Thomas, at the request of the agent of the bank, they took a note for twenty-four hundred dollars in the name of Estill alone. The reason why the note was taken in the name of Estill was, that the bank had much difficulty in bringing suits in its own name in Alabama, and also for the purpose of consummating an agreement between the agent of the bank and Estill, to-wit, that he should hold and use said note, or a part thereof, in payment of the fees due to the plaintiffs. This note was sued on in the name of Estill, and judgment recovered against Thomas. The partnership of Cochran & Estill was dissolved in April 1842. After the dissolution of

the firm, it appeared that Smith, the President of the bank, and Estill went together to the store of Cunningham & Dixon, and it was agreed that Smith should sell the judgment in the name of Estill against Thomas, upon Smith undertaking to pay the fees due Cochran & Estill. Thereupon Cunningham sold and delivered Smith goods to the amount of the judgment. Smith, however, afterwards refused to pay the fees, and they are still unpaid. In a few days afterwards, Cunningham called on Estill to transfer the judgment to him, which Estill declined to do, because the fees were not paid, but on the 21st day of February 1843, Estill did execute a transfer to Cunningham of all the right he had in said judgment, and on the same day Cunningham executed an instrument to Estill, by which, after reciting that he held the receipt of Cochran & Estill for a note in their hands for collection on John S. Bennett, and endorsed by Looney, payable to the Western Bank of Georgia, he transferred said note to Estill for the purpose of paying him all fees due from said Bank of Rome (which appears to be the same as the Western Bank of Georgia); and which provides that after paying all fees, the residue, when collected, shall be paid to said Cunningham. The foregoing facts appeared from the admissions of Estill and Cunningham, who, differing about the matter, had verbally submitted the question of Cunningham's liability to arbitrators, before whom they both made statements, as evidence on which they should act. The arbitrators awarded that Cunningham should not pay anything.—Cochran, however, was not present.

The defendant offered as a witness Dixon, the partner of Cunningham, who testified that the goods given to Smith for the judgment were the goods of the firm of Cunningham & Dixon, and were equal in value to the judgment, and that Thomas had satisfied the judgment in full by paying the amount to the Bank at Montgomery on a debt due by Cunningham & Dixon, and which was done with the consent of Cunningham & Dixon. The witness stated, that whether he was interested or not in the matter depended on his own choice; that there was no agreement which bound him to pay any portion of the sum that might be recovered in this suit. This witness also stated that he saw Cochran in the summer of 1842, and enquired of him why he had not assigned the judg-

ment, who replied that he was willing to do it until he ascertained it was in the name of Estill alone, and it was therefore unnecessary for him to assign it. The plaintiffs objected to the competency of this witness, on the ground of interest, but the objection was overruled. They also objected to all admissions made by Estill alone, after the dissolution of the partnership, which objection was also overruled. The testimony tended to show that the defendant Cunningham had notice of the dissolution of the firm. The court charged the jury that if the judgment in favor of Estill belonged to the bank, and Estill held a lien upon it for fees due the plaintiffs from the bank, and Smith, the President of the bank, offered to sell the judgment for goods to Cunningham and his partner, and if Smith and Cunningham applied to Estill, who agreed, on the promise of Smith to pay the fees, to transfer the judgment to Cunningham and to look to Smith for the fees, and thereupon Cunningham and his partner, with the knowledge and consent of Estill, delivered the goods to Smith, relying on the promise of Estill to transfer the judgment to them discharged of the lien, then Estill could not, after the goods were delivered and beyond the reach of Cunningham and his partner, refuse to transfer the judgment, or set up his lien upon it for fees, nor could the plaintiffs recover of the defendant any part of the proceeds for their fees.

The court further charged the jury, that if Cunningham was in no wise interested in the fees due the plaintiffs by the Bank of Rome, nor liable at all for them, and had voluntarily promised to pay them, after he had bought the judgment, that such a promise would be a *nudum pactum*, and of no force in law.

To these charges the plaintiffs excepted, and now assign them, together with the several rulings of the court, as error.

Rice, for plaintiffs in error:

1. After dissolution, one partner has no right to transfer a judgment rendered in favor of himself, *but upon which the firm has a lien for a debt due to it;* especially when the only pretended consideration of such transfer is the verbal promise of a third person to pay the debt due the firm, and when the transfer is made to one who has had no previous dealings

whatever with the firm until after dissolution, and who has notice of the dissolution and notice of the lien of the firm upon the judgment. Story on Part. 481.

2. Such a transfer is a "*new contract*," which cannot be made by one partner after dissolution. This "new contract" would be highly injurious to the firm, by depriving it of its judgment lien and security, and forcing it to take a mere promise of a third person, (which may be void by the statute of frauds, or otherwise worthless.) Bell v. Morrison, 1 Peters' Rep. 370; Story on Partn. 458–461, and note 3—471, notes 1 and 2. The doctrine of the English books on this subject is overturned by American courts. Story on Partn. 461, note 3.

3. After dissolution, the admissions of one partner are not evidence against another. Story on Partn. 460 to 462; Barringer et al. v. Sneed, 3 Stew. Rep. 201; Bell v. Morrison, 1 Peters, 351–372.

4. The witness Dixon was clearly incompetent to testify for his copartner Cunningham. Simmons v. Smith, 21 Eng. Com. Law Rep. 374; Collins v. Flowers, 1 How. Miss. Rep. 26; Cline v. Little, 5 Blackf. 486; Pike v. Blake, 8 Vermont, 400; Pinney v. Bugbee, 13 ib. 623; Tompkins v. Beers, 2 Root's Rep. 498; Lowry v. Summers, 7 Halst. 240.

L. E. Parsons & Morgan, for defendant:

1. If this was not a partnership demand, the witness Dixon was clearly competent. If it is, he is competent, because it is a good defence "under the general issue, or specially in bar." 1 Chitty's Pl. 50; 3 Bacon's Ab. 697; 2 Vernon, 97; 3 Term Rep. 433-35; Foster et al. v. Hooper, 2 Mass. 572.

2. Either partner may release or transfer a debt due the firm, after dissolution. Beak v. Beak, 3 Swans. 627; Morse v. Bellows, 7 N. Hamp. 549; Beecham v. Curry, 19 Johns. 143; Correls v. Boswell, 1 Dana, 475; Porter v. Bristow, 4 M. & Selw. 156; King v. Smith, 4 C. & P. 108; Biggs v. Fellows, 8 B. & C. 402.

3. Admissions made by one partner, after the dissolution of the firm, are competent for all purposes as evidence, except to create a liability not existing while the partnership was in existence. Wood v. Bradick, 1 Taunt. 104; Bell v. Morrison, 1 Peters, 351; Mann v. Locke, 11 N. Hamp. 246; Parker v. Merrill, 6 Greenl. 410; 4 Paige, 17.

DARGAN, J.—The counsel for the plaintiffs in error, in their argument, present three questions: 1st—that one partner has no right, after the dissolution of the firm, to transfer its effects or choses in action so as to bind the firm; 2d—that the admissions made by Estill after the firm was dissolved, in reference to the transfer made by him, were illegal proof; 3d—that Dixon was interested in the event of the suit, and therefore incompetent to testify.

1. We do not not deem it necessary to examine how far, or under what circumstances, one partner, after the dissolution of the firm, has the power to transfer the partnership assets, or assign the partnership demands; for the rule is well settled, that in a suit at law all the plaintiffs must be entitled to recover, or the suit cannot be maintained; and any matter that will negative the right of one of the partners to bring the suit is sufficient to defeat the action. If, for example, one partner has released the debt, although such release may be a fraud on his copartner, yet a suit at law cannot be maintained in the partnership name for its recovery, and the party injured by the act of his partner can obtain redress in a court of equity only. Richmond v. Hemppy, 1 Starkie's Rep. 204; Coll. on Partn. 383; Biggs v. Lawrence, 3 Term. Rep. 383; Jacaud v. French, 12 East. 317.

By joining in the suit the partner who has done the wrongful act, they rely on his right to recover, and must abide by all his acts; and if any one of them would bar the right of one partner, this is sufficient to bar the action. In the case of Jones v. Sikes, 9 B. & C. 532, it was said by Lord Tenderden, that he was aware of no case in which one has been allowed in a court of law to rescind his own act on the ground that it was a fraud on the rights of another, whether the party seeking to do this sues in his own name or jointly with the person injured by his act. The principle that all the partners must be entitled to recover, or the action cannot be maintained, is fully recognised in the American courts, and indeed, so far as I have observed, has never been denied where the common law of England prevails. Story on Partn. ch. 12, p. 360 to 365; 2 Gallison, 130; 16 Johns. 438. As it is the established rule that all the partners must be entitled to recover, in order to maintain the suit, any act of one partner, whether done be-

fore or after the dissolution of the firm, that will bar him, will equally preclude the partnership from bringing an action at law in the name of all the partners. The transfer of the judgment to Cunningham is binding on Estill, and he therefore cannot recover of the defendant on the ground that he had a lien on the judgment for fees due to the firm of Cochran & Estill; and as Estill cannot recover, it follows that a suit at law cannot be maintained in the name of Cochran & Estill.

2. Nor is it necessary for us to examine how far, or under what circumstances, the admissions made by one partner, after the dissolution of the firm, will bind the other partners; for if it be admitted that such admissions could not be received as evidence to bind the other partners, it is very clear they are admissible to show that the partner making them has no right of action, and if this be shown, the whole suit must fail. The admissions of Estill, in reference to the transfer made by him to Cunningham, are evidence in a suit at law, binding on him, and, being binding on him, they are legal testimony in bar of the suit.

3. We come, however, to the conclusion that the court erred in admitting the testimony of Dixon. Although the transfer of the judgment was made to Cunningham alone, the goods with which it was purchased belonged to the firm of Cunningham & Dixon, and the judgment was satisfied by Thomas by his paying the amount of it on a debt due by Cunningham & Dixon to the Bank at Montgomery. The judgment was therefore purchased with the goods of the firm, and its proceeds were paid for the benefit of the firm, and it may be said to the firm. The transfer to Cunningham must therefore be considered as in trust, *or for the use of the firm.* If the amount of this judgment or any part of it should be recovered against Cunningham, in consequence of anything growing out of the contract of transfer, he would stand as a creditor of the firm to the extent of the recovery, for the reason that money received to the use of Cunningham & Dixon would be recovered of Cunningham alone. Such a recovery would entitle Cunningham to call on Dixon to account for his proportion of the money improperly received by the firm, and which he alone had to refund. Dixon, *notwithstanding his opinion* that he was in no manner bound to account for any portion of the

recovery, is liable to Cunningham for his proportion of any amount that may be recovered of him. He was therefore legally interested in defeating the suit, as he thereby defeated his liability to Cunningham.

For this error, the judgment must be reversed and the cause remanded.

Judge CHILTON, having been employed as counsel in the court below, did not sit.

JOHN, ADM'R, *vs.* PARKE JONES.

1. Can a surety, when sued at law by his co-surety for contribution, impeach the validity of a purchase by the latter of trust property, conveyed by the principal for his indemnity, to reduce the recovery, or must he not in such case resort to a Court of Equity for relief?—QU.
2. Where property is conveyed by the principal for the indemnity of a surety, his co-surety is liable for contribution, as to any balance that may remain due, after a faithful application of the proceeds of the trust estate towards the extinguishment of the debts.
3. One surety, having funds of the principal in his hands, for the purpose of paying the joint liability, cannot, as against his co-surety, be allowed reimbursement, out of the trust estate, for costs, commissions and damages, that subsequently accrue, without the latter's consent.
4. A surety, against whom a judgment is rendered, does not lose his right to have contribution from his co-surety, by sueing out a writ of error, and superseding the judgment.
5. A. J., for the indemnity of P. J., a surety, executes to W. a deed of trust on two parcels of land, &c., which provides, that should the said P. J., in consequence of his liability, at any time thereafter, "suffer loss or damage, or be compelled to pay the said debts, or any part thereof, the said W., when requested by the said P. J, shall proceed to sell the property, or so much thereof as may be deemed sufficient, and from the proceeds of the sale reimburse and satisfy the said P. J. for all loss or damage which he may have sustained:" P. J. is compelled to pay a sum of money for A. J. greatly less than the conjoint value of the two parcels of land, and, at his request, W. advertises the lands for sale, but A. J. objects to one parcel of the land being sold separately from the other, as contemplated by the deed, for the reason that they will not thus sold command their full value: The parties thereupon enter into an agreement, by which A. J. consents to a sale of the two

parcels of land *together*, and an appropriation of the proceeds, not only to the reimbursement of P. J., but towards the extinguishment of the other liabilities provided for in the deed, and in consideration thereof, P. J. covenants to "release the said A. J. from all claims or demands whereon he, the said P. J., is bound as security for the said A. J.— *Held*—

1st. That the agreement as to P. J. is supported by a sufficient consideration:

2. That the effect of P. J.'s covenant to release A. J. is to discharge W. H. J., a co-surety, from all liability for contribution.

Error to the Circuit Court of Perry. Tried before the Hon. John D. Phelan.

THIS was an action of assumpsit, by the defendant against the plaintiff in error, to recover contribution for monies paid by him, as co-surety with William H. Jones, the plaintiff's intestate, of one Allen Jones. A bill of exceptions, found in the record, discloses the following state of facts: On the 30th October 1843, Allen Jones executed to Anthony P. Walke, a deed of trust on two parcels of land and a number of slaves, which after reciting the liability of the plaintiff below, as his surety on certain notes, drafts, and bonds, and among them two notes, in favor of one Daniel Jones for $1000 and $3210 respectively, on each of which the said plaintiff, and the defendant's intestate were his securities, provides, "that should the said Parke Jones, or his representatives, at any time hereafter suffer loss or damage, in consequence of any of the above described notes, drafts or bonds, or be compelled to pay the same or any part thereof, that then, and in that case, the said Anthony P. Walke, his heirs or assigns, shall when requested by the said Parke Jones, after giving thirty days notice of the time, place and terms of sale, by such advertisement as he may deem best, proceed to sell, at public auction for cash, to the highest bidders, the property herein conveyed, or so much thereof as may be deemed sufficient, and from the proceeds of sale, after paying the costs attending the execution of this conveyance, reimburse and satisfy the said Parke Jones, or his representatives, for all loss or damage, interest and cost inclusive, which he or they may have sustained in consequence of his above mentioned suretyship." The note for $1000 was reduced to judgment in the County Court of Marengo county,

on the 16th September 1844, against Allen and Parke Jones, upon which a writ of error was sued out to the Supreme Court, and supersedeas bond given by said Allen and Parke Jones, with one Saunders, as their surety, where it was subsequently affirmed with 10 per cent damages and costs. This judgment, amounting, principal, interest, damages and costs inclusive, to $1305 45, was paid by Parke Jones in September 1845. The other note for $3210 was reduced to judgment in the amount of $3869 50 in the District Court of U. States at Tuskaloosa, against the said Allen and Parke Jones on the 28th May 1846; which judgment was satisfied as hereinafter stated. The slaves mentioned in the deed of trust were sold under execution by the sheriff of Marengo, and the proceeds of the sale applied to the payment of the debts provided for in the deed, but the specific appropriation of this fund is no where shown. After this sale by the sheriff, Walke, the trustee, advertised the two lots or parcels of land, (which, there was some evidence tending to show, were together worth more than enough to reimburse the said Parke Jones the whole amount he had paid out, as well as to discharge all of his remaining liabilities for Allen Jones) when the latter objected to the sale taking place, on the ground, that if the lands were sold in separate parcels, according to the provisions of the deed, (the two together composing one plantation) they would not bring their value. The parties thereupon on the 31st October 1845, entered into an agreement, by which, after a recital of the execution of the trust deed of the 30th October 1843, and that it had become evident, that the entire property would have to be sold eventually, to meet the demands which it had been conveyed to secure, and that it was thought best for all the parties concerned, the said Allen and Parke Jones covenanted, the one with the other in the sum of twenty thousand dollars, that the said Allen should suffer "the said Walke to sell the *whole of the real estate together*, and to apply the proceeds of the sale to the entire fulfilment of the terms, object and intention of the said deed of trust;" and that the said Parke in consideration of the premises, among other things, would "*release the said Allen Jones* from all claims or demands whereon he, the said Parke Jones, is bound as security for the said Allen Jones" &c. Certain

portions of this agreement seemed to contemplate, that the said Parke Jones should, at the sale, become the purchaser of the property, and there was testimony conducing to show, though it was conflicting on this point, that in consequence of an understanding at the sale, that he would be the purchaser, and assume the payment of the remaining debts, the property sold for greatly less than its value. At the sale, which took place after the execution of the above agreement, Parke Jones did become the purchaser of the two parcels of land at the price of $4660, and the trustee, Walke, made him a deed for the premises, allowing him in the settlement of the amount of his bid, a credit of $2225 75, which he had paid for Allen Jones in the discharge of the judgment of $1306 45 and in satisfaction of other demands provided for in the deed, and taking from him his obligation to pay the balance on the debt, on which the judgment in the District Court at Tuskaloosa was afterwards rendered, whenever the marshal should require payment. This last judgment, including principal, interest, costs and marshal's commissions, was satisfied in full on the 26th October 1846, by sale, under execution, of the slaves of said Parke Jones. In the course of the trial the defendant offered to introduce proof as to the pecuniary condition of the plaintiff at the time of and immediately after the sale of the lands, but the court excluded the evidence.

Much testimony appears in the bill of exceptions, which has no bearing on the points embraced in the opinion of the court and is therefore omitted.

The court charged the jury in substance:

1st. That if after the faithful application of the proceeds of the property, to the debts provided against in the deed of trust, a balance remained due, which Parke Jones, the plaintiff, had paid, and against which he had no indemnity, the defendant as to such balance was liable for contribution.

2d. That Parke Jones, the plaintiff, was entitled to reimbursement out of the trust effects for the costs, Supreme Court damages, and marshal's commissions paid by him.

3d. That the covenant of Parke Jones, the plaintiff, contained in the agreement of 31st October 1845, did not absolve the defendant from liability for contribution.

The defendant's counsel asked the court to charge the jury,

that if the plaintiff paid the judgment in the County Court of Marengo, as the security of Allen Jones, on a writ or error bond, and as co-security of Saunders, he is not entitled to have contribution from the defendant, which charge the court refused to give.

To the ruling of the court, to each of the charges given, and to its refusal to charge as requested, the defendant excepted and now assigns them as error.

John, for plaintiff:

1. The testimony in relation to the pecuniary condition of Jones at the time of the sale, was certainly proper and should have been admitted.

2. To establish the right to contribution, the plaintiff must shew that his payment has removed a common burthen from himself and the defendant, and that each are benefited by it; this seems to be a principle universally admitted. Screven v. Joyner, ex'r, et al, 1 Hill's Chan. Rep. 260.

3. If this position be true, it follows that the estate of W. H. Jones was not liable to contribution to the plaintiff, for cost beyond the court cost. Sheriff's commissions, Supreme Court costs and damages in Supreme Court, never were a common obligation. The estate of W. Jones, was never liable for any of these costs, and there payment by the plaintiff was no advantage to the estate. Boardman v. Paige, 11 N. Hamp. 431; Woodson v. Johns, 3 Munf. 230.

4. The deed in trust made by Allen Jones to P. Jones, to which W. H. Jones was not a party, cannot affect the estate, so as to enlarge the plaintiff's right to contribution, especially as all these costs, &c., were incurred after the making of the deed. To apply any portion of the indemnity to the payment of cost and commissions, &c. for which the estate was not liable, would be a misapplication of the indemnity.

5. The plaintiff Jones was bound to make a prudent disposition of the property conveyed to him in the deed, and to apply the proceeds properly; therefore, if he applied the proceeds of the property to the payment of liabilities for the payment of which his co-surety was not bound—this would be a misapplication of the fund for their joint indemnity, and the estate of this co-surety would be discharged, *pro tanto*.

6. Jones cannot claim contribution on account of his payment of the thirteen hundred dollars. By executing the supersedeas bond with Saunders, he released the estate from liability on account of that case. It is very clear that Saunders could not claim contribution from the estate, and that P. Jones can recover contribution of his co-surety Saunders; therefore, P. Jones, by placing himself in the condition of Saunders as to this estate, cannot recover contribution. Dunlap v. Foster, 7 Ala. 734; Langford's ex'rs v. Perrin, 5 Leigh's Rep. 552; Fitzpatrick's adm'r v. Hill, 9 Ala. Rep. 783.

7. By the proper legal effect of the deed executed by Parke Jones, Allen Jones, and his wife C. T. Jones on the 31st Oct. 1845, Parke Jones became a principal in the debts to Daniel Jones and thereby discharged the co-surety from liability to contribution. Theobald on Prin. & Sur. 1 Law Lib. 2 Cor. 6.

8. The deed executed the 31st Oct. 1845, will operate as a release of the principal by the surety, and the surety cannot release his principal, and hold his co-surety liable to contribution, for if the surety recover from his co-surety, the co-surety would have a right to recover immediately from the principal the amount he had been thus compelled to pay. And thereby the security who releases the principal could violate his contract with the principal. This deed might be regarded as a composition by the security with the principal, and if it is so the co-surety is discharged. Pickering v. Marsh, 7 N. Hamp. Rep. 192.

9. A release by a creditor to one joint and several obligor, discharges both. Tuckerman, et al. v. Newhall, 17 Mass. Rep. 581.

Garrott, for defendant in error:

1. The point most vitally affecting the parties in this case is as to the effect to be given to the instrument signed by Parke Jones and Allen Jones, dated October 31st 1845. Can this instrument be construed to operate as a release to defendant as administrator? The words used are, "the said Parke Jones, in consideration, &c. agrees to *release* the said Allen Jones, &c." 1st. There was nothing in existence upon which this release could take effect to the extent contended for, because the liability of Allen Jones to Parke Jones had not then

fully accrued, and a release must take effect *in presenti*.—Dillingham v. Estell, 3 Dana, 21; Seymore v. Minturn, 17 J. R. 169. 2. This instrument does not contain the proper words of a release, and any release to have the effect contended for must be a good technical release.—17 J. R. 169. 3. A release not under seal, and without consideration, is void.—Jackson v. Stackhouse, 1 Cow. 122; Gibson v. Weir, 1 J. J. Marshall 446. 4. Since our statute (Clay's Digest, 340 § 153) permits the consideration of instruments under seal to be enquired into—a release is void, unless supported by a sufficient consideration. In this case, there was no consideration in the deed, and none was shown; the law day of the first deed had passed; the trustee had advertised the land for sale, Allen Jones resisted, because, as shown in the last instrument, it was for the benefit of all parties that the land should be sold in a body; and in order to induce Allen Jones to do what was for his own benefit, as well as the others concerned, Parke Jones agreed to pay Woodfin $200 in money or value, to release A. Jones from $500 for rent of land, and to pay his wife $400 for her dower. Surely all this was sufficient consideration for Allen Jones' signing the bond. 5. But this could not be a release, because it is absurd to suppose that one debtor can release another from the payment of a debt for which they are both bound. 6. The language is, plaintiff "*agrees* to release," does not actually release, but only *agrees* to do so. This agreement plaintiff might stand to or not, as he chose, and the remedy of Allen Jones would be for a breach of his covenant. 7. No consideration whatever passed to plaintiff for this covenant; A. Jones had before conveyed his land and that was beyond his control. Even if plaintiff had agreed to receive the land in satisfaction of his liability for A. Jones and the land would not have discharged this liability, the agreement would have been a *nudum pactum* as to the overplus.—Smith v. Stone, et al. 4 Gill & Johns. 310. 8. But if the agreement was binding, then it would not operate as a release in favor of defendant's intestate.—Clayton v. Kynaston; Aloff v. Scrimshaw, & Lacy v. Kynaston, 2 Salk. 573, 4 and 5; Dean v. Newhall, 8 T. R. 168; Garnett v. Mason, 2 Brock. 184, 219.

2.—1. The court did not err in rejecting evidence as to the pecuniary condition of the plaintiff, because defendant did not

indicate his intention of attacking the *bona fides* character of that sale, and if he had, the sale could not have been declared void in this proceeding.—Gary v. Colgin, 11 Ala. Rep. 511. 2. As defendant's intestate claims under the deed, he must take according to its terms, and the deed provides that plaintiff shall be paid for all "*loss or damage, interest and costs inclusive*" he may have sustained in consequence of his suretyship.

CHILTON, J.—We cannot perceive upon what principle the evidence rejected could be admitted. There was no attempt in the court below to impeach the *bona fides* of the sale to Parke Jones. The controversy seems to have been with respect to the application of the proceeds of the sale of the land, and both parties seem to have acquiesced in the sale. The proof was therefore most clearly irrelevant, and its exclusion could not possibly have been attended with any injurious consequences to the defendant. It may also futher be questioned whether one standing in the relation of co-surety to the beneficiary in the deed, can, when sued for contribution *at law*, be allowed to impeach the validity of a purchase made by the plaintiff, of the trust effects conveyed for the plaintiff's indemnity, and thus by charging the plaintiff with a higher price for the effects purchased by him, lessen *pro tanto* the demand for which the parties were bound as sureties. Should not the defendant in such case resort to a court of equity, so that the parties might be placed in statu quo, and the land resold, according to the rules prescribed by that court? As it is not necessary to a correct disposal of this case, we decline a decision of the question.—See 11 Ala. Rep. 519. It was correctly decided that the estate of the deceased co-surety was bound to contribute towards the payment of the joint liability by Parke Jones, as to any surplus which should remain after a proper application of the trust funds of the principal to the satisfaction of the demands, unless the statute of non-claim interposed a bar; for it is very clear that the co-surety has a right to share equally with the plaintiff who demands contribution, the benefit of any payment made by the principal, or out of his effects.

In respect however, to the right of Parke Jones to be reim-

bursed the marshal's commissions, and the costs of the Circuit and Supreme Courts, together with damages of ten per cent added by the judgment of the latter court on affirmance, out of the trust effects, being funds in his hands as the proceeds of the sale of the land, we think the Circuit Court mistook the law. It is certainly true that Parke Jones had the right to protect himself against his individual liability for Allen Jones by the deed of trust, and so far as he had paid, or was liable to pay, at the time of the execution of the trust deed, cost, damages, &c., he had a right under the deed to be reimbursed; but the law will not permit him, holding the funds in his own hands, to suffer costs and damages to accrue upon the debts which the funds are designed to adjust and pay off, and to hold either his principal or co-surety liable for the same.

It is said by Mr. Pitman, in his work on Principal and Surety, 152, that a surety cannot claim contribution from his co-surety for the costs of defending an action brought against him by the creditor, unless the co-sureties authorised him to defend the action. The reason assigned is, that it is the duty of the surety to pay the debt, if just, when demanded by the creditor, in which event, the costs, damages and sheriff's commissions would have been avoided. But another reason may be given: The surety has a right to stand on the very terms of his contract. He is, in default of the principal, bound to contribute to the payment of the debt, but he does not obligate himself to pay any portion of the costs and damages, which may be superadded by the unauthorised act of his co-surety. This is not a common burthen, but must be borne by him who has been the cause of creating it. Suppose that Parke Jones had interposed the plea of *non est factum*, and in litigating that defence, a large amount of costs and damages had occurred, would it not be manifestly absurd to say that his co-surety should contribute to the expense attendant upon an effort to cast upon him the payment of the whole debt? In Knight v. Hughes, 3 Car. & Payne 467, a judgment had been rendered against one W, for whom the parties were sureties, as collector of taxes, and afterwards, W failing to pay, separate suits were instituted against his sureties, Knight and Hughes. Judgment being rendered against the former for the amount of the judgment and costs against W, he paid

it, and sued Hughes in assumpsit for contribution. It was held by Lord Tenderden, C. J., that Hughes was only liable to pay one moiety of the amount of the original verdict, and further that as against Hughes, the plaintiff had no right to set off an amount he had recovered from the principal against the cost, but that it might go towards the extinguishment of the demand for which the co-surety was bound. See also Bleaden v. Charles 7 Bing. 246; Roach v. Thompson, M. & K. 487; Gillett v. Reppon, ib. 406; Pitman on Prin. & Sur. 135.

The sueing out of the writ of error to the Supreme Court, and giving bond for its prosecution, does not have the effect to destroy his right to contribution. It is true, if Saunders had paid the debt, he could not have claimed contribution from Wm. H. Jones, as the latter was not bound with him upon the bond, but the giving of the writ of error bond by Parke Jones was incident only to the defence which he set up, and as he was under an obligation to indemnify Saunders, the judgment being against him, when he pays the debt, the right to contribution attaches as against the other co-surety, bound for the payment of the note on which the judgment was founded. So that while we consider the cases of Dunlap v. Foster, 7 Ala. Rep. 730, and Fitzpatrick's adm'r v. Hill, 9 Ala. Rep. 883, as holding the correct doctrine, which would exclude Saunders from the right to contribution, if he had paid the money, so far as W. H. Jones is concerned, still these decisions do not apply to the right which Parke Jones, the surety upon the note, has to call on his co-surety, notwithstanding he may have superseded the judgment against him by giving the bond.

If, however, we were mistaken in this view, there is another view of the case, which is in our opinion conclusive of it, so far as its decision in this upon the record now before us is concerned. By the agreement of 31st October 1845, the present plaintiff, in consideration of its execution, and the alteration made of the deed in respect to the manner of selling the land, &c., agreed to release Allen Jones from all claims wherein he the said Parke was bound at the time of the execution of said agreement as security for Allen Jones, except some claims which have no connection with this controversy. It is insisted by the counsel for the defendant that this instru-

ment cannot take effect as a *release*, inasmuch as the liability of the principal to Parke Jones had not then fully accrued, and that until the surety had paid the debt, there was no such existing liability as could be released, because a release technically so called, must operate *in presenti*. But we think it very clear, the counsel mistakes the nature of this argreement. Parke Jones does not propose to release the principal from his then liability to him by reason of previous payments made on account of the principal, but to release him from all debts for which he was then bound as surety. In other words, the said Parke Jones undertakes, in consideration of the provisiou made for him by the said Allen Jones, himself to become the principal, and to discharge the said Allen from the debts—or, which is the same thing, to procure his *release* from all the claims. This covenant is not only under seal, but we think, under the facts presented by the record must be regarded as sustained by a valuable consideration. By reason of it, the whole estate was sold at one time, and Parke Jones enabled to become the purchaser, without paying ready money for it. By it, he acquired the right to have the property sold before he was compelled to pay the money, and if he esteemed the property conveyed of value sufficient to pay the debts, there was nothing unreasonable in his engagement to discharge the principal from the debts, as he had the power (and the agreement seems to contemplate its exercise) of buying in the estate when sold, as it appears he afterwards did.

Having thus ascertained the true construction of the covenant, on the part of Parke Jones, in the agreement of the 31st October 1845, to release the principal from all claims, &c., it follows, that having satisfied them, he cannot call on his co-surety for contribution on account of these claims. Did such right exist, and were Parke Jones allowed to recover from Wm. H. Jones' estate, the administrator could recover the amount thus adjudged against him, from Allen, the principal, who in turn would recover from the plaintiff in this case. Here then would be three suits, and nothing finally accomplished, save the loss of the costs of their prosecution. But this doctrine of contribution is founded upon equitable principles, and it would be most inequitable to permit the plaintiff to recover from his co-surety money which, by his covenant,

he would be bound to refund upon the action of their common principal.

The views we have taken being conclusive of the case, it is unnecessary further to elaborate this opinion in discussing the other points raised upon the record.

Let the judgment be reversed, and the cause remanded.

EVANS, Adm'r, *vs.* EVANS.

1. The omission of the holder of a promissory note to present it to the personal representative of the deceased principal, within eighteen months after grant of letters of administration, will not release one co-surety from contribution to another, who has subsequently paid the debt.

Error to the Circuit Court of Wilcox. Tried before the Hon. Nathan Cook.

Assumpsit by defendant against plaintiff in error as administrator of Thomas Evans, deceased. In 1839, Harris S. Evans as principal, and the defendant in error and Thomas Evans, deceased, as his sureties, executed a note to one Coley for upwards of $1100, on which suit was brought and judgment rendered, at the fall term 1839 of Wilcox Circuit Court, against the defendant in error alone, the other parties to it having in the meantime died. Coley filed his claim against the estate of the principal in the note, which was disallowed by the Orphans' Court of said county in 1845. No presentation of the demand was ever made to the personal representative of the plaintiff in error. On the first of May 1846, the defendant in error compromised the amount due on the judgment with Coley, by paying him $1600, and on the 11th day of the same month instituted this suit for contribution. Upon this state of facts, the court was requested to charge the jury that the plaintiff was not entitled to recover, which charge the court refused to give; whereupon the defendant excepted, and now assigns it as error.

Bethea & Beck, for plaintiff in error.
Sellers, for the defendant.

COLLIER, C. J.—It is not shown by the transcript that judgment was rendered upon the demurrers interposed in the Circuit Court. True, there are notes made (apparently) by the clerk, in which it is stated that the demurrers were overruled, but these are not noticed in the judgment entry and cannot be considered here, although they may have authorised a modification of the entry *nunc pro tunc*, had a motion been made for that purpose in the court below. We would, however, remark that we have looked into the pleadings, and are strongly inclined to think that the defendant has not been prejudiced by the decision upon the demurrers against him.

In McBroom et al. v. The Governor, &c., 6 Port. Rep. 32, it is conceded to be a general rule that the extinction of the liability of the principal debtor is also the extinction of the liability of the surety; but it is added, that an exception obtains, when this extinction is caused by operation of law. It was further said, that if a loss results from the delay of the creditor to present his claim to the representative of the principal debtor, where the latter has died, this neglect cannot destroy the obligation of the surety, any more than in any other case where the loss is the consequence of the delay of the creditor. No case, it is believed, can be found, in which it has been held that mere passiveness will discharge the surety. So it has been held, that a surety cannot plead that his principal is dead, and due presentment of the claim was not made to his representative. Nor will the omission to present the claim for payment to the representative of the principal in the debt affect the right of the surety to recover from his estate, if he is compelled to pay it. Hooks & Wright v. The Br. Bank at Mobile, 8 Ala. Rep. 580.

Where a demand against the estate of a deceased person is not presented within eighteen months after the grant of letters testamentary or of administration, if it did not accrue until after the expiration of that period, it will not be barred by the statute until the expiration of eighteen months from the time of its accrual. Neil v. Cunningham's Ex'rs. 2 Port. Rep. 171; see also Cawthorne v. Weisinger, 6 Ala. Rep. 714; Powe & Smith v. Tyson's Ex'rs, 15 Ala. Rep. 221.

The previous decisions of this court, which we have cited, we think are decisive of the present case. The presentation of the claim by the creditor, and its disallowance by the Orphans' Court, does not make them inapplicable. Such a proceedure, whether the decision of the Orphans' Court was correct or not, could have no effect upon the plaintiff's liability to the creditor. The creditor was not bound to present it, and its rejection left him, as it respects the sureties, with all his legal rights unimpaired. These, we have seen, entitled him to recover of either or both the sureties, and the plaintiff, having discharged the judgment against him, may coerce contribution of the defendant. The insolvency and distribution of the estate of the principal, previous to the payment of the debt by the plaintiff, are unimportant; for until it was paid, the plaintiff had no cause of action against the estate of his principal or the defendant, and the present action appears to have been instituted within eleven days after that time.

It remains but to add that the judgment is affirmed.

CATTERLIN *vs.* SPINKS.

1. On the trial of an appeal from a justice of the peace, the appellate court, being required by statute to try the case *de novo*, and to give judgment according to its justice and equity, &c., should, in a case where the plaintiff could maintain trespass or assumpsit, disregard the form of the warrant designating the proceeding as an action of debt.
2. Assumpsit for use and occupation will lie against a naked trespasser on real estate, in favor of a lessee who elects to waive the trespass and permits the trespasser to retain possession until the expiration of his term.

Error to the Circuit Court of Choctaw. Tried before the Hon. John Bragg.

This was an action of debt to recover rent of land, and was commenced by the defendant against the plaintiff in error, in a justice's court, and thence carried by appeal to the Circuit Court. The facts are sufficiently set out by the court in its

opinion for a full understanding of the points decided. The amount in controversy being less than twenty dollars, the case was submitted to the court below without a jury, and a judgment was rendered against the defendant, from which judgment he has now sued out this writ of error.

D. Smith, for the plaintiff in error:

1. Spinks rented the land of himself, he being the crier, also being one of the school commissioners appointed by the State and representing the interest of the State. This was contrary to the public policy and a fraud upon the State, and Spinks acquired by such a purchase no title. McGee v. Lindsay, 6 Ala. Rep. 16.

2. Spinks has never been in possession of the land, and could not bring an action for mesne profits until he had obtained possession of the land, even by action of *trespass*. Fry v. Branch Bank, at this term.

3. Trespass is the only action that could be sustained under any circumstances against a naked trespasser. Neither assumpsit nor debt will lie. An action for use and occupation can only be sustained where the relation of landlord and tenant exists between the parties. Bancroft et ux. v. Wardle, 13 Johns. 489; 3 Johns. Cas. 335. When an entry on land is tortious, the tort cannot be waived and the rent recovered in assumpsit. Richey v. Hinds, 6 Ohio, 371. To sustain an action for use and occupation, a *contract* express or implied must be proved. 2 Saund. Pl. & Ev. 890; 1 Term Rep. 378; ib. 387; Elliott et al. v. Boaz et al. 13 Ala. 535.

4. In Davidson v. Ernest, 7 Ala., and Hull v. Vaughan, 6 Price, *permission* was given by plaintiff to defendant to occupy the land, from which a promise was infered to pay for it.—Here there was no permission, but defendant was a mere naked trespasser.

5. Justices of the peace have jurisdiction of trespass only to the amount of twenty dollars—of other actions to the amount of fifty dollars. They cannot therefore confound trespass with actions *ex contractu*.

Rapier, for defendant in error:

1. The facts disclosed by the record show a good cause of action. The plaintiff in error was liable on an implied pro-

mise for use and occupation. See Davidson v. Ernest, 7 Ala. Rep. 817; Hull v. Vaughan, 6 Price's Rep. 157.

2. To sustain a judgment, every thing compatible with the record will be presumed. 3 Stew. 444.

3. The suit having been commenced before a justice of the peace, and the amount in controversy being less than twenty dollars, formality was not required. Not even a statement was necessary in the Circuit Court. (8 Port. 562; 1 Stew. 266.) There it was proper to try the case according to its equity and justice, without regard to any defect in the warrant or other proceedings. See Ala. Rep. 57, 204; 2 Stew. 480; 5 Port. 213; 6 ib. 121; 1 Ala. Rep. 157.

4. If, under the facts of the case, assumpsit for use and occupation could not be maintained, yet the judgment is good, as resting on a suit for damages. Forms of action before justices of the peace are disregarded.

CHILTON, J.—The act of 1841 authorises a justice of the peace to take jurisdiction of all cases of damages, whether the same arose from matter of contract, or any kind of tort or wrong done whatever, (except actions of slander,) where the damages claimed by the plaintiff do not exceed twenty dollars. Clay's Dig. 358, § 3. And by the act of 1819, it is provided, that in all cases of appeal from judgments of justices of the peace, the court before which such appeal shall be brought shall proceed to try the same *de novo*, and give judgment according to the justice and equity of the case, without regarding any defect in the warrant, capias, summons, or other proceedings of the justice of the peace before whom the same was tried. Under these statutes, if the plaintiff below could have maintained trespass or assumpsit for use and occupation against the party in possession, the count very properly disregarded the form of the warrant designating the proceeding as an action of debt.

We need not stop to inquire as to the right of Spinks to rent the land at auction, himself being one of the commissioners and the crier at the renting. This is a question with which the plaintiff in error has no concern whatever. So long as the commissioners are satisfied with the contract made with Spinks, it is not for a stranger to say there may be some fraud

in the matter as against them, and thus deprive them of a bargain which may be advantageous. See Gary v. Colgin, 11 Ala. Rep. 519; Foster v. Goree, 5 Ala. Rep. 424; Brown v. Lipscomb, 9 Port. Rep. 472; Herbert v. Hanrick, at this term. We proceed then to ascertain whether the action lies under the circumstances of this case.

The bill of exceptions informs us that the evidence before the court below showed that Catterlin was in possession as a naked trespasser of fifteen acres of land on the 16th section, and had prepared the same for planting in the spring of 1846, and cultivated it in that year; that Spinks was one of the commissioners of the 16th section, and in the spring of 1846 rented the land at public renting by the commissioners for 1846—Spinks being the crier; that the rent of the land was worth one dollar per acre. No evidence was offered of any contract or agreement between Catterlin and Spinks. We are not informed whether Catterlin entered upon the possession of Spinks, or whether he took possession before Spinks rented. The bill of exceptions is silent as to the fact, and being silent, we must construe the bill most strongly against the party excepting, and intend that the renting was previous to the trespass, for this intendment is necessary to support the judgment.

The question then recurs, can the party recover for use and occupation in the absence of an agreement? The case of Elliott v. Boaz, 12 Ala. Rep. 535, is not applicable to a case like this. In that case the court merely decide that the surety for the vendee upon notes given for the purchase money, in the absence of any contract other than his suretyship, and who never had taken possession of the land, was not bound for the rent decreed to be paid by his principal, on a recision of the contract upon the application of the latter.

The case of Davidson v. Earnest, 7 Ala. Rep. 817, does not, it is true, come quite up to the case at bar. In that case there was a permissive holding by the defendant, under a parol contract for the purchase of the land, which he repudiated, and having failed to consummate it, the court held him liable to the vendor for the rents in assumpsit. In the Dean and chapter of Rochester v. Pierce, 1 Camp. Rep. 466, it appeared the defendant had occupied without any demise, but Lord Ellenborough held that an action for use and occupation did not

necessarily suppose a demise. "It is enough that the defendant used and occupied the premises by the permission of the plaintiff." In Hull v. Vaughan, 6 Price's (Exc.) Rep., the doctrine of Lord Ellenborough was unanimously affirmed by the Court of Exchequer. It appeared in that case, that one Bach, the solicitor of Vaughan, contracted with the latter for the purchase of some freehold estate, and afterwards sold a portion of it to Hull, the plaintiff, who took possession and made valuable improvements. Vaughan refusing to comply with his contract, Bach filed his bill for specific performance, and being attached for his failure to bring into court the purchase money, and Vaughan taking advantage of the report current in the country of Bach's inability to pay, &c., went to Hull and induced him to surrender the possession to him (Vaughan.) But Bach having raised the funds, and Hull finding his mistake, went to Vaughan and demanded the possession, who refused to give it up; whereupon he knocked the lock off the gate and took possession. Afterwards Vaughan re-entered and put on a new lock and kept Hull out for the space of two years, when Bach obtained a decree against Vaughan, who thereupon surrendered possession of the premises and executed the deed, &c. Hull brought assumpsit for the two years' rent against Vaughan, and the court after full consideration, was, as we have said, unanimous in the opinion that the action was maintainable. This case we regard a correct exposition of the law, as applicable to the case adjudicated, and the principle there determined applies to the case before us. Here the term of the tenant has expired. He can have no action of ejectment or trespass to recover the possession and consequential damages, as he is not now entitled to the possession. He has elected to treat the defendant not as a trespasser, but has permitted him to hold the possession and to cultivate the land during the term for which he rented it, and unless he can maintain the action of assumpsit, it would appear that he is without remedy. But conceding that he might, under the circumstances, bring an action of trespass *quare clausum fregit*, still, under the act first referred to above, the jurisdiction of the justice of the peace would attach, and upon that hypothesis the judgment of the Circuit Court would be defensible: For we repeat, the informality of the warrant in describing

the nature of the action can make no difference in the appellate court. The case must be tried *de novo*, on its justice and equity. McCoy v. Smith, 1 Ala. Rep. 158; Clay's Dig. 315, § 12.

The justice and equity of this case is clearly with the plaintiff below. Our conclusion is, that the judgment must be affirmed.

ROBINSON *vs.* FARRELLY.

1. If the parties to an instrument, at the time of its execution, intend it as a security, whatever may be its form, equity will consider it a mortgage; and no terms or words used in it will be allowed to change its character and cut off the right of redemption.
2. Where the vendee retains the *right to demand re-payment* of the vendor, notwithstanding the purchase, and although the property should be lost, it is conclusive to show that the transaction was intended as a security and not a conditional sale.
3. If the vendee takes from the vendor no note or other evidence of the debt, it is a strong circumstance to show that a sale and not a mortgage was intended, but it is by no means conclusive.

Error to the Chancery Court of Mobile. Before the Hon. Joseph W. Lesesne, chancellor.

The bill in this case was filed by the defendant against the plaintiff in error, to redeem two slaves, Pompey and Julia. It alleges that on the 2d day of June 1846, the complainant executed to Robinson, the defendant, a bill of sale for three slaves, Pompey, Julia, and Mary, with a condition annexed thereto, that the complainant should have the privilege of redeeming them by paying to the defendant one thousand dollars on or before the first day of July thereafter. It is also alleged, that the conveyance was not intended to be absolute, but was intended to give to the defendant a lien on the slaves to the extent of his claim, and to secure him in the payment of one thousand dollars, which complainant owed to him. It is further stated that the complainant, with the consent of the defendant, sold Mary on the 6th of June for four hundred and

sixty dollars, and on the same day paid to the defendant four hundred and fifty dollars, leaving a balance of five hundred and fifty dollars due on said debt.

The defendant demurred to the bill, and also answered, denying that the conveyance was a mortgage, or intended so to be, and insists that it was intended as a sale, with the privilege of repurchase. The instrument is set out in the answer, and is in the following form: "For and in consideration of one thousand dollars, paid to me in hand, I hereby transfer and set over all my right and title in the following slaves, Pompey, about 32 years old, Julia, aged 18, and Mary aged 25 years: All the above slaves I forever warrant and defend to John Robinson, against all claim or claims whatsoever. E. Farrelly—attest, James Bondurant."

The above sale is made for the consideration therein expressed, with the privilege of redemption on or before the first day of July 1846, as the parties may agree,—signed by the parties. The answer also states, that after the instrument was executed, the question arose between the complainant and the defendant, as to whether the said slaves were at the risk of the complainant or defendant, when it was fully understood, that after the time limited for their redemption, they were to be at the risk of the defendant, and the bill of sale absolute. The answer admits that complainant sold Mary, but denies that he paid complainant four hundred and fifty dollars on account of said debt, but says that he deposited four hundred and forty dollars with him for safe keeping, which he afterwards withdrew. The testimony shows that the complainant and defendant were living together at the same house, and were negro traders, but it does not appear distinctly in whose possession, or under whose control, the slaves remained after the execution of the instrument. The chancellor decreed in favor of the complainant, which is now arsigned as error.

Taylor, for plaintiff in error:

1. The contract as set forth by the complainant himself in his bill, is clearly a conditional sale, and not a mortgage, and the allegation, that "the bill of sale was not intended as an absolute sale," does not aid the defect, without the further alle-

gation of fraud, accident or surprise. The bill is not filed to correct a mistake, or to reform the contract, but is filed to redeem on the instrument itself, as though it was a mortgage on its face. I insist therefore, that the bill will not admit of proof to change the legal effect of the contract, and ought to have been dismissed for want of jurisdiction.—12 Ala. Rep. 678.

2. But supposing the bill contained equity, the chancellor erred in his decision on the bill, answer and proofs. The defendant attaches the original contract of sale to his answer, and it is unquestionably a *conditional sale.* It has none of the requisites of a mortgage.—8 Ala. Rep. 807; 9 ib. 24; 7 ib. 724; 12 ib. 678; 1 Powell on Mortg. 139, n.; 2 Ball & B. 274; Hilliard on Sales, 18, 19; 2 Edward's Ch. Rep. 138; 9 Yerg. 172; 14 Pick. 467; 5 Gill & J. 75; 5 Leigh 439; 8 Con. 143. The word *redeem,* in the condition of the bill of sale, means the same thing exactly as the words *re-purchase, re-sale or recovery.*—2 Edward's Ch. Rep. 138, (Judges' opinion;) 1 Pow. on Mortg. 139, note.

3. This being the legal effect of the instrument, it cannot be contradicted or varied by parol testimony without the requisite charge in the bill to allow it.—12 Ala. 678. This I insist is conclusive of the case without further reference to the testimony. If however, it is permissible to go into the evidence of *intention,* then the onus is on the *complainant,* in order to overcome the positive denial of the defendant and the *prima facie* effect of the written bill of sale, to prove by clear and positive testimony that the parties intended to make a mortgage, at the time, and that it was not their intention to make such a contract as would have the effect of a conditional sale. This the complainant has totally failed to do; on the contrary, all the testimony goes to show that both parties intended to make a conditional *sale,* or some instrument that would give defendant an absolute right to the slaves, after a certain day. All the *tests* resorted to in doubtful cases, and recognised in the above authorities, are found here to be in favor of a conditional *sale.* 1. A deed absolute on its face, with a conversion only. 2. A delivery of the property when it was sold. 3. The want of any note for the money due Robinson, or any covenant, or stipulation, or evidence of any sort to bind

complainant to pay. 4. The defendant was a negro trader, had no employment for the negroes, yet no interest is reserved to Robinson, or any compensation to him for the use of his money in the mean time. 5. Considering that complainant was also a trader, whose only business was to watch occasions to make large profits on money, and turn it over often in the course of a month, the price received by him was exceedingly reasonable. 6. The negotiations did not commence with a proposition to loan or borrow money, and there is no evidence whatever of a previous existing debt.—7 Cranch, 218, 237; 9 Yerger, 176; 5 Gill & Johnson, 75; 7 Ala. Rep. 924.

4. There are other points in this case still stronger than those upon which the above cases were decided, to wit: In the condition written under the bill of sale, which is signed by both parties, they themselves call it "*a sale.*"

5. Some of the negroes were sickly, and the complainant required it to be understood positively, that if any of the negroes died after the day appointed for the redemption, that it was to be Robinson's loss and not his, and this brings us to still another point without which a mortgage cannot exist, that is, the want of mutuality. The negroes were sickly; if they had died, could Robinson have made Farrelly pay for them? If they had depreciated in value, could he have made Farrelly take them back? or could he, after the law day, have filed his bill to foreclose, and if they did not bring enough to pay Robinson, could he have sued Farrelly for the balance? Certainly not. The whole of the conditions were for Farrely's benefit only; he had until the day appointed to speculate on the life of the slaves, or upon the rise and fall of their value, and also the prospects and probabilities of a better use of the money in the mean time. But the court will not continue this right of speculation any longer than the parties themselves have agreed.—1 Russ. & M. 506; 4 Kent Com. 144.

Rapier, for defendant:

1. The transaction was a mortgage, and is substantially set forth in the bill. The courts have been averse to construing such an agreement as a mere conditional sale. The term "redeem" used in the agreement indicates a mortgage, and

the circumstances of the transaction as shown by proof *aliunde*, afford most of the tests of a mortgage. There was great disparity between the value of the property and the consideration of the transfer. The consideration was an advance of money. An indebtedness was created—this appears from the fact amongst others, that soon after the transaction $450 were paid towards the satisfaction of the debt. The possession of the slaves remained with the mortgagor.—2 Porter's Rep. 414; 7 Ala. Rep. 724; 2 Ala. Rep. 555; 1 P. on Mort. 130, n. ib. 7; 4 Kent, 142, 143; 2 Story's Equity; Quinn v. Brittain, 1 Hoff. 353; 5 S. & P. 67. An absolute conveyance may be shown by parol evidence to have been intended as a mortgage, on the ground that it does not contradict the contract, but gives it the effect the parties designed.

2. The proof and the undenied allegations of the bill were sufficient to warrant the preliminary decree.

DARGAN, J.—The plaintiff in error contends that the bill should have been dismissed for want of equity. The material allegations are, that the complainant executed to the defendant a bill of sale of the slaves, with a condition annexed, that he should have the privilege of redeeming them by paying one thousand dollars on or before the first day of July 1846: that the conveyance was not intended to be absolute, but was intended to give the defendant a lien on the slaves, to secure him in the payment of the one thousand dollars, which complainant owed to him.

We think there can be no doubt but that the bill contains equity. The rule is unquestionably settled, that if the transaction was intended as a mere security for a debt, whatever may be the form of the instrument, it must in a court of equity be considered a mortgage.—Flagg v. Mann, 2 Sumn. 533; 1 Powell on Mort. 138, note 7; Hicks v. Hicks, 5 Gill & Johns. 76; Williams v. Owen, 10 Simons, 386. The demurrer admits that the complainant owed the defendant a thousand dollars, and that to secure the payment thereof, the instrument of conveyance described in the bill was executed. This admission shows, that the conveyance was a mortgage, for it admits the debt, and that the instrument was intended as a security for its payment.

The question whether the complainant is entitled to relief on bill, answer and proof, is one of more difficulty. The answer denies that the parties intended the instrument as a mortgage, and insists that it was a sale, with the privilege of repurchasing within the time limited by the instrument, but admits that the slaves were at the risk of the complainant, until the expiration of the time within which he had the right to redeem them, after which, they were to be at the risk of the defendant.

The nature of a sale, with the right to repurchase for a given sum, and within a specified time, is a conveyance of the title to the purchaser; he is the owner of the property, but the vendor has the right to repurchase if he sees fit; no obligation rests on him to do so, it is a mere matter of volition, whether he will or not. If he declines to repurchase, he is not bound to refund the money, and the purchaser has no cause of action against him because he does not see fit to claim his privilege. If the purchaser retain the right to demand the money of the vendor, notwithstanding his purchase, a debt is then due from the vendor to him, and the existence of this debt within itself shows that the conveyance is a mere security for its payment.

It is equally true, that if the parties intended, at the time the instrument was executed, that it should be a security for a sum of money, due by the vendor to the vendee, no words used in the instrument can cause it afterwards to operate as a sale, and not as a mortgage; for if the transaction in its inception was a mortgage, a court of equity cannot permit it to be converted into an absolute purchase by a mere default in the payment of the mortgage money at the appointed time. The rule is, once a mortgage, always a mortgage.—Willett v. Willett, 1 Vern. 488; 10 Leigh 264; Henry v. Davis, 7 Johns. Ch. Rep. 40. What then was the intention of the parties at the date of the transaction? Taking the answer for my guide, for the testimony affords little or no light on the subject, I think the parties intended a loan of money, but if not paid at the time stipulated, that then the conveyance should be absolute and unconditional. The reason why I think it was understood as a loan of money is, that the defendant admits, that the slaves were to remain at the risk of the com-

plainant until time elapsed within which he had the privilege to redeem, but afterwards, they were to be at his risk. Had the slaves died before the time expired, what would have been the rights of the defendant according to his answer? They would have died the property of the complainant, and he would have owed the defendant a thousand dollars. He did not therefore, take the risk of a contract of purchase at the date of the transaction, but his money was to be secure to him, although the slaves died before the expiration of the time appointed for the complainant to redeem. This, to my mind, is conclusive, that a sale was not intended at the moment of the execution of the contract, but it was intended to be a sale only in the event the complainant failed to pay within the time prescribed. In a sale with a right to repurchase, as well as in an unconditional sale, the title must pass to the purchaser, and if the chattel die, or be destroyed, the loss must fall on him, although a mere proviso, giving the right to repurchase, will not turn a *bona fide* purchase into a mortgage, yet if the purchaser does not take the risk of the contract upon himself, but retains the right to demand the money if the chattel die or be destroyed, the transaction in a court of equity must be considered a mortgage.—Powell on Mortgages, vol. 1, 138, note 7; 2 Sch. & Lef. 393.

It is however insisted, that as the defendant received no evdence of debt, nor demanded any, he has no remedy against the person of the debtor for the sum mentioned in the bill of sale, and therefore no debt exists between the parties, and without a debt, there can be no mortgage. I admit that a debt is necessary to the existence of a mortgage, but a debt may exist although no bond or note be taken for its payment, and even although its existence be known only to the creditor and debtor. True, the omission to take a covenant for the payment of the debt, or some evidence of its existence, is a strong circumstance to show that the parties intended a sale, and not a mortgage, but it is not conclusive.—7 Cranch, 218; Goodman v. Grierson, 2 Ball & Beat. 274; 3 Atkins. 278; Mellor v. Lees, 2 Atkins. 494; and if the intention from the transaction appears to have been that the conveyance was a security for a debt due, it will be so decreed, notwithstanding no obligation is reserved affording evidence of it.

We come then to the conclusion as stated, that at the time of the transaction, the parties considered the transfer as a mere security for the sum mentioned in it, but that they also intended that if the complainant did not redeem the slaves within the time, his right of redemption should be lost. This being the fair construction of the contract from the answer of the defendant, the complainant can now redeem, for if at the beginning the parties looked on the transaction as a security for a sum of money, no terms or words used in the instrument can be permitted to cut off the right of redemption.

Let the decree be affirmed.

MIDDLETON'S ADM'R, ET ALS. *vs.* MAULL'S ADM'R.

1. Creditors of an estate, regularly declared insolvent, who have presented their claims to the administrator within eighteen months after grant of administration, but who have failed to file them with the clerk within six months after the decree of insolvency, are entitled to be paid if the estate should ultimately prove *solvent*, and at the final settlement, should be permitted to show that the administrator is chargeable with assets which he has not accounted for, with a view of establishing the fact of its solvency.

Error to the Orphans' Court of Lowndes.

This was a proceeding before the Orphans' Court for a final settlement of the administration of James Maull, deceased, on the estate of James P. Larkins. It appeared that Maull, the administrator, had reported the estate of his intestate insolvent, and that on the 8th of July 1844, after due notice, a decree was rendered declaring said estate insolvent. A final settlement was ordered to be made on the 14th day of April 1845. On the day appointed, David H. Middleton, Benjamin Mock and other creditors of the said James P. Larkins appeared and filed exceptions to the account filed by the administrator for final settlement, and suggested that he had not charged himself with various sums of money received by him as such administrator, and also that he had not accounted for

various articles of personal property, consisting of the crop growing in 1843, at the time of said Larkins' death, and also certain slaves. The administrator replied to these suggestions or exceptions to the account filed for final settlement, denying their truth, and avering that none of the contesting creditors had filed their claims in the clerk's office within the time prescribed by the statute after the estate was declared insolvent, and he therefore insisted that these claims were barred, and that the creditors had no right to controvert the account or object to the settlement. On the trial it appeared that the estate was duly declared insolvent on the day specified, and although the contesting creditors had presented their claims to the administrator within eighteen months from the grant of letters of administration, yet they had not filed their claims in the clerk's office within six months from the time the estate was declared insolvent. Two of said creditors, Middleton and Mock, offered to prove on final trial that all the exceptions filed by them to said final settlement were true, and that the estate was not insolvent, but the court rejected the evidence, and they excepted. On this state of the proof, the court decided that their claims were barred by the statute, and that they could not make themselves parties to, or contest the correctness of the accounts on the final settlement; to which ruling of the court the plaintiffs in error also excepted. The errors assigned are: 1st—that the court erred in receiving as evidence the record of the decree of insolvency; 2d—that the court should have received proof that the estate was not insolvent.

Bolling and T. & J. Williams, for plaintiffs in error.

Judge & Stone, for defendant.

CHILTON, J.—The question presented by the record is, whether the creditors of Larkins' estate, Middleton and Mock, who had presented their claims to Maull, the administrator, within eighteen months, but who had not filed them with the clerk of the Orphans' Court within six months after the estate had been declared insolvent, should have been allowed *upon the final settlement of the estate to show that the estate was then solvent, by proving that the administrator had failed to charge himself with the crop of* 1843, *and with eight slaves specially*

named, and a wagon and harness, which he failed to return to said Orphans' Court as assets.

In the opinion of the court below, the failure of these contesting creditors to file their claims within six months after the estate was declared insolvent, was a complete bar, notwithstanding the estate *at the time of final settlement* may have been perfectly solvent. We readily concede, that all the creditors who fail to exhibit their claims within six months after the estate is declared insolvent must be excluded, and their claims barred, *if the estate continues insolvent up to the final settlement.* That is, such claims are barred as against the assets of an insolvent estate. Such is the decision in Hollinger v. Holley, in 8 Ala. Rep. 454, as I understand it. But that the decree of insolvency, predicated as it is upon the report of the administrator—which report in the nature of things must in many cases be incorrect—shall be final and conclusive upon the court and all the creditors, notwithstanding the estate may afterwards turn out to be perfectly solvent, is opposed, in my opinion, not only to our previous decisions, but to the spirit of our legislation and to all the analogies of the law.

By the act of 1843, (Dig. 192, § 2,) the administrator, &c., when the estate is in his opinion insolvent, is required to file an allegation of the fact, praying that it may be so declared, which allegation is to be accompanied by three schedules thereto attached, viz: one is to contain the full statement of all the goods and chattels, choses in action, and personal estate of the deceased, with the estimated value thereof; the second, the real estate with its location, the nature of its tenure, and its estimated value; and the third, a statement of all the claims against the estate, their nature and amount, and the residence of the creditors. Upon the filing of such allegation, a day is set apart by the clerk or judge for declaring the estate insolvent; notice is to be given by publication, &c., and if no objection is made by the creditors on the day, the decree passes as a matter of course, but if objection is made, an issue is formed and the question of solvency *vel non* tried by a jury.—The act does not provide for the litigation between the creditors as to the justness of their respective demands upon this issue, but contemplates that their claims shall be *afterwards* filed within six months; and the mode of bringing on the con-

test between them is pointed out, which may be done by the administrator or any creditor in his name filing objections to any claim within nine months from the decree of insolvency. I cite these statutes, stating them substantially, to show that the decree of insolvency was evidently designed by the Legislature as interlocutory merely. The administrator in his schedule of effects may return a number of desperate notes due the estate—may mistake the value of the real and personal property; by the collection of these notes, supposed to be desperate, or the appreciation in the value of the assets, the estate may, after the decree of insolvency, be rendered perfectly solvent. Besides, the claims presented in the six months, or a large portion of them, may turn out to be wholly unjust, and thus the estate, though reported insolvent and so declared upon the presumption of their justness, is and always has been able to pay all its debts. In such case, where the estate is able to pay all the debts, as well those presented in eighteen months as those presented in six months after the decree of insolvency, the effect of the final settlement is to set aside the interlocutory decree of insolvency, and the creditors are paid in full, instead of receiving a *pro rata* distribution; and all the creditors who have presented their claims within eighteen months have the right to be paid, for the reason that the estate is settled as a solvent, not an insolvent estate. Such was the decision by this court in Phelan v. Phelan, 13 Ala. Rep. 679, where it was held that although an estate was declared insolvent, yet if on settlement it proves not to be so, creditors who have not filed their claims within the six months are nevertheless entitled to payment if they had presented such claims to the administrator within eighteen months after grant of administration. Now it appears to me to be an anomaly in judicial proceedings, to hold that if the estate *chance* by the administrator's own showing, or by a controversy raised at the instance of the creditors who have proved their claims within six months, to turn out solvent, the eighteen months creditors may come in, and yet that they shall be denied the privilege of showing the facts upon which the payment of their claims depends, viz: that assets have come to the administrator's hands adequate to the payment of all the debts. The fact that the six months creditors, if I may thus designate them, may

show the estate to be solvent on final settlement by charging the administrator with assets not returned, is sufficient to show that the decree of insolvency is not conclusive. (See Clay's Dig. 226, § 27.) In Edwards v. Gibbs, 11 Ala. Rep. 292, it was held, that the effect of a decree of insolvency is to transfer to the Orphans' Court *the exclusive jurisdiction of all claims against the estate*, and in that court, on final settlement, it may be shown that the administrator has withheld or wasted the assets. So that according to this decision, if the creditors have no remedy in the Orphans' Court, they cannot sue upon the bond, or otherwise hold the administrator liable for his failure to return to the court a proper account of the assets which came to his hands.

To hold that these creditors are barred for failing to present their claims in six months after the decree of insolvency, when the estate is on final settlement solvent, is to dispense with the statute of 1815, usually denominated the statute of non-claim, which is the only statute prescribing *in terms* a bar for failing to present claims, and which provides that unless they are presented within eighteen months from the grant of administration, they shall be barred.—Clay's Dig. 195, § 17. I am then of opinion that Middleton and Mock, who had presented their claims within eighteen months, should have been allowed to prove on the final settlement that the estate was solvent, and that the court erred in refusing to permit them to show that the administrator had received or should have been charged with assets which had not been returned, and for which he had in no wise accounted. A different conclusion would cut off many creditors, who, charged only with constructive notice of the allegation of insolvency, and without any notice in fact, have failed to contest with the administrator the truth of his allegations of the insolvency of the estate. It would, in such cases, be holding out inducements to administrators to report estates insolvent, on a partial ascertainment of their true condition, with the hope that should the effects turn out sufficient to pay all the debts, they should retain the surplus after paying the creditors who have come in and filed their claims in six months under the act of 1843; for if the decree of insolvency be final and conclusive, and may not be gainsaid on final settlement, then as the distributees cannot share with creditors in

an insolvent's estate, the administrator would be entitled to the surplus, which could never have been contemplated by the Legislature. It is unnecessary for us to determine whether the creditors, who have presented their claims in eighteen months, can come in if the estate is more than sufficient to pay the six months creditors, but not adequate to pay all the demands presented against it. All that we decide now is, that if the estate is solvent, those creditors who have presented their claims in eighteen months are entitled to payment on final settlement, and to show that it is solvent by charging the administrator upon such settlement with all the assets which have come to his hands, or which should by the exercise of proper diligence have been reduced to his possession. In this opinion the Chief Justice coincides with me.

The decree of the Orphans' Court is consequently reversed and the cause remanded.

DARGAN, J.—I cannot concur in the opinion of the court. I think it too clear to admit of argument, that a decree of insolvency, rendered in accordance with the provisions of the act of 1843, is final and conclusive on all the creditors, and neither they nor any one else can be permitted again to litigate that question. The fact of insolvency by the decree becomes *res adjudicata*, and is equally as conclusive on all parties as any other sentence or judgment pronounced by a court of competent jurisdiction.

The only question, therefore, is, whether any creditor can be permitted (if he has failed to file his claim within six months after the estate has been declared insolvent) to litigate any question with the administrator, with the view to swell the amount of the assets and thus create a larger dividend. If a creditor who has neglected to file his claim with the clerk within the time prescribed by law can be permitted to do this, has he not the right to show that the assets are sufficient to pay all the debts, and thus re-litigate the question of insolvency?

In the case of Hollinger v. Holley, 8 Ala. 454, this act was fully considered, and the court held, that if a creditor neglected to file his claim within six months after the decree of insolvency, in the office of the clerk of the Orphans' Court, his

claim or demand was barred. I am satisfied that this opinion is a correct exposition of the act; and if a creditor omits to file his claim with the clerk in the manner prescribed, he cannot be permitted to litigate any question whatever with the administrator in reference to the amount of the assets in the Orphans' Court.

It is however urged that the case of Phelan v. Phelan, 13 Ala. 679, is opposed to the case of Hollinger v. Holley and to the views here expressed. The facts of that case were peculiar. The creditor who had not filed his claim had obtained a judgment at law against the administrator before the decree of insolvency. It afterwards appeared, that the estate was solvent, and after paying all claims that had been filed in the clerk's office, there was a large balance in the hands of the administrator, who then paid all the judgments against him but one, which had not been filed with the clerk within the prescribed time, and did not contest the payment of this one, but insisted as against the right of the distributees to retrieve the amount of the judgments he had paid, as well as the amount of the one not paid, but which he did not contest. We held that he ought to be permitted as against the distributees to retain those amounts.

If it be conceded that this decision can be sustained, which I think is very doubtful, yet it will not sustain the position that a creditor can litigate on a final settlement the question of the insolvency of the estate, to avoid the consequences resulting from a failure on his part to file his claim within a prescribed time. Here the administrator insists on the failure of the creditor to file his claim as a bar to all litigation against him in the Orphans' Court. To hold that this does not create a bar, when pleaded as such, I think not only overrules the case of Hollinger v. Holley, but is directly repugnant to the intention and design of the act of 1843.

PURYEAR, Ex'R, *vs.* PURYEAR.

1. Slaves purchased by a wife, in the life-time of her husband, with her separate estate or the proceeds thereof, will be regarded in a Court of Equity as standing in the same predicament, in respect to the title, as the money that was paid for them; and if she is in the possession of slaves thus purchased, or in which her husband has conceded to her the exclusive title, she may, after his death, successfully defend an action at law brought by his personal representative for their recovery. The fact that the purchase was made from the husband himself cannot affect the principle.
2. If a wife purchases property from a firm, of which her husband is a member, pays for it with money furnished by him, and with his acquiescence takes a bill of sale in the name of a third person for her use, will not the transfer of the title operate as a postnuptial settlement and be effectual against all persons except creditors and purchasers?—QUERE.
3. The use of the wife's money by the husband, in the purchase or the redemption of his own encumbered property, will not *per se* invest the wife with such a title as will enable her, after her husband's death, to successfully defend an action at law brought by his personal representative for its recovery, and a charge to the jury which assumes the reverse of this principle is clearly erroneous.

Error to the Circuit Court of Monroe. Tried before the Hon. John Bragg.

DETINUE by the plaintiff as executor of Alexander B. Puryear, deceased, to recover of the defendant in error, who is the widow of his testator, slaves Sarah, Anna and Harriet, and her four children. On the trial a bill of exceptions was sealed at the instance of the plaintiff, from which it appears that in 1833, Alexander B. Puryear, deceased, and his wife, the defendant, removed from Virginia and settled in Monroe county, bringing with them the slaves Anna and Harriet, and that they remained in their possession until the death of the testator in 1842: that before the testator and his wife left Virginia in 1833, these slaves had been sold under a deed of trust by one Fisher and bought by him, with the promise that he would relinquish all title to them to the said testator on his discharge of the amount due by him, which had been done, but with whose money, or in what way the debt was discharged, does not appear to have been shewn with any cer-

tainty. There was evidence that the testator had frequently spoken of these slaves since his removal to Alabama as the property of his wife, and also evidence to show that by her thrift and industry, and with her husband's permission, she had accumulated a considerable sum of money, which she frequently loaned in greater or less amounts to her husband, taking his notes for such loans and receiving payment thereof from him. There was also proof that she owned a boy called Dan, by bequest from her brother, that the testator had hired him from her one or two years in Virginia, and paid her the hire, and that when they came to Alabama, the testator was insolvent, and Dan was left in possession of Fisher. It is further shown by the bill of exceptions, that Sarah was owned by the testator and plaintiff in error, who were partners in negro trading under the firm name of A. B. & R. C. Puryear, and by the direction of the testator was sold by one Goode, to the defendant, who paid for her and took a bill of sale in the name of Martha Puryear, her mother. Goode had before this sale been the general agent of A. B. & R. C. Puryear in selling slaves, but at the time of the sale was not acting in that capacity.

Upon this state of facts, the court charged the jury: 1st. That if Sarah belonged to the firm of A. B. & R. C. Puryear, and the bill of sale was made by Goode and acknowledged by A. B. Puryear, one of the partners, the plaintiff was not entitled to recover said slave. 2d. That if the slaves Anna and Harriet were redeemed from Fisher with the money of the defendant, that then the plaintiff could not recover them, although they had not been settled on her, to her sole and separate use.

To these charges, the plaintiff excepted, and each of them is now assigned as error.

T. & J. Williams, for plaintiff:

1. Where property is purchased in the name of the the wife, such property vests immediately in the husband,—Barlow v. Bishop, 1 East's Rep. 432; 2 Story's Eq. 754, § 1386; Roper on Husb. & Wife, 169, 170; and that the purchase is made with money, the proceeds of a separate estate, makes no difference, if the purchase is made by the wife and not by the trustee.—12 Pick. 173; 7 Meeson & Welsby, 183.

2. Where property is purchased and paid for, but titles taken in the name of a stranger, a trust results in favor of the purchaser, or person paying the purchase money—2 Story's Eq. 439 to 445; and in such case where the trust is for the benefit of the wife, the marital rights of the husband will attach, so soon as the husband reduces the property into possession.—1 Atk. 603; 1 P. Wms. 308; 1 Peters, 508. This is settled in all the cases where trusts are created for the benefit of husband and wife jointly, unless words are used expressly defeating these rights. 2 Story's Eq. 608, § 1831; Lamb, trustee, v. Wray, et al. 8 Porter, 72.

A. B. Cooper, for the defendant:

All the principles involved in this case were settled in the case of Puryear v. Puryear, 12 Ala. 13. That case was maturely considered, and the authorities cited and refered to in that case fully sustain it—many other authorities may be adduced.

The plaintiff relies entirely upon the cases in 7 Meeson & Welsby, and 12 Pickering. The case in M. & W., was a case where creditors were seeking to subject the property. This fact alone, whatever else may be in the case, is sufficient. This court in the case in 12 Ala., drew the distinction between the administrator and the creditors. The case in 12 Pickering has no bearing on this case—there was no pretext there that the wife had a separate estate. Opposed to these authorities see—10 Wend. 335; 17 Johns. 552–3–4 and 577; 2 Story §§ 1375–1386; 11 Ala. 386; Clancy, 272; 4 Mason, 443, 454; 1 Vesey 46–48; 3 P. Wms. 337, 338; 2 Vern. 535.

COLLIER, C. J.—In Hoot, et al. v. Sorrell, et al. 11 Ala. Rep. 386, it was held that the profits derived by the wife from her separate estate are her property, and may be disposed of or invested by her as she pleases; and property which she acquires by purchase with her income is not subject to the payment of the husband's debts, especially if she has not allowed it to go into his hands, or be subject to his control. It has been supposed that a wife may sell her separate estate to her husband, may use it in making a purchase from him, and that such a purchase will be protected against his creditors.

Clancey on H. & W., 350; 2 Bro. Rep. 51; 2 Vesey, Jr. Rep. 698; 10 Vesey's Rep. 139. Although the husband is not bound to account to the wife for her separate estate which she has permitted to go into his possession without objecting, yet if it was received by him without her knowledge, he has been held chargeable for it—Clancey on H. & W., 351 to 354; 2 Vesey's Jr. Rep. 488; 2 P. Wms. 82. So if the wife advance her separate property as a loan to her husband for the payment of his debts, she is entitled to stand in the place of the creditors. And where the separate money of the wife is applied by the husband in the purchase of an estate, she will *pro tanto* be an incumbrancer upon the estate.—Clancey on H. & W., 612; 2 Atk. Rep. 383; 5 Mad. Rep. 414; 10 Vesey's Rep. 511.

Where a second husband borrowed money from his wife, which came to her in right of her first husband, and gave her his note for it: *Held*, that the note was a valid security, and after the death of the maker, might be set up in equity against his estate. Huber v. Huber's adm'rs., 10 Ohio Rep. 371.—Even gifts between husband and wife have been supported in equity.—1 Atk. Rep. 270. So where the husband voluntarily allowed the wife for her separate use to make a profit of various articles beyond what were used in the family, of which she saved £100, which the husband borrowed; the wife's right to the money was upheld *against his estate.*—3 P. Wms Rep. 337. It has been often decided in chancery that a post nuptial conveyance by the husband to the separate use of the wife, will be sustained, where the consideration is property received from her.—2 Roper on H. & W., 227; Reeve's Dom. Rel. 166; 1 Atk. Rep. 269; 10 Ves. Rep. 146; 2 Johns. Ch. Rep. 537; 7 Johns. Ch. Rep. 57.

In Piquet v. Swan, et al. 4 Mason's Rep. 443, it was insisted that although a post nuptial settlement by a husband upon his wife, might be valid, yet the moment the proceeds or income arising from the property secured were paid by the trustees in the hands of the wife, they ceased to be trust funds, and were immediately liable to the payment of the husband's debts in the same manner as if they had been her property not secured by trusts. Mr. Justice Story said, "this proposition is utterly untenable in a court of equity. It involves in

effect, a total defeat of the original trusts. These trusts were to secure the income and proceeds to the sole and separate use of Mrs. Swan, with an unlimited power to dispose of them as a *feme sole.* Nothing is more clear than that the separate property of a *feme covert,* secured or given to her separate use, will be upheld for her use by a court of equity into whosever hands the same may come, whether of a stranger, or even the husband; if it comes clothed with trusts, and with notice of it, the party so possessing it, becomes a trustee for the *feme covert.* It is in no sense the property of the husband, and can never become his, except by a voluntary appropriation of it to his use, by the wife herself. She may invest it as she pleases; and appropriate it to furniture, or pictures, or plate, or jewelry, or bank stock, or other securities, or personal ornaments or paraphernalia, still it is her own, and cannot be touched while she retains her power and dominion over it." *Again:* "Indeed, the moment courts of equity decided that *femes covert* could hold separate property to their own use as *femes sole*, it was a necessary consequence that the protection of it should be as universal as the right."

It is said that the separate provisions for married women are—1st, where property is settled in some form to their separate use: 2d, where an allowance is made to them by their husbands, before or during marriage, for their maintenance, &c. The former being for her separate use, is her separate estate, of which she may dispose as she thinks proper; but the latter being intended for personal enjoyment, she cannot deprive herself of it. If she save money out of her separate estate, the savings are always hers against all claimants. And if she purchases lands and houses with what she has saved, the court will follow the purchase and secure it against the husband for her benefit. Clancey on Husband and Wife, 3, 271 to 276.

A *feme covert* acting with respect to her separate estate in personal property, and the rents and profits of her real estate during life, it is said is competent, according to equity jurisprudence, to act in all respects as if she were a *feme sole.*—1 Bro. Ch. Rep. 19; 2 Ves. Sr. Rep. 190. With respect to that property a court of equity will consider her so far distinct from her husband as to suffer her to sue or be sued by him,

or by any other person.—3 Atk. Rep. 478; 3 Mad. Rep. 474; 1 Ves. Jr. Rep. 278; 9 Ves. Rep. 486; 2 Ves. Sr. Rep. 452; 3 Johns. Ch. Rep. 77. It must be observed that what we have said in respect to the settlement or bequest of property to the separate use of married women, indicates the principles which are recognised and administered in equity; the common law will not allow her to possess personal property independently of her husband.—Puryear & Wallace v. Beard, 14 Ala. Rep. 121, and citations there made to the point.

In Puryear v. Puryear, 12 Ala. 13, it was decided that where a husband permits the wife to lend for her own use, money which she was allowed to receive for the hire of a slave, and after the husband's death the money thus lent is repaid to her by the borrower, the administrator of the husband cannot recover it from her. But the husband could not thus have disposed of the hire to the prejudice of creditors. It was admitted by the court that the husband might have claimed the money, and that it was liable for the payment of his debts; but having died without asserting any claim, the administrator could not maintain the action. *Further:* "We can perceive no reason whatever, why the wife, in cases like this, should not be protected in the enjoyment of the property by a court of law. If she were compelled to sue the personal representative, as for a debt due from her husband, possibly she would have to resort to a court of equity, but being in possession of the fund, and having the right to retain it, she has both the legal and equitable title to it, and may doubtless defend that right in a court of law. The acknowledged principle, that where the evidence of a debt is in the name of a married woman, the husband may join his wife with him in the suit, and that if he does, it will survive to her, if he dies pending the suit, is entirely analogous to this case, and shows that after the decease of the husband, without reducing the money to his possession, the legal title to it is vested in the wife." In Slanning v. Style, 3 P. Wms., Rep. 337, the wife retained the excess over the sum allowed for the expenses of the family by her thrift and management, with the permission of her husband, and she was held to be entitled to it against the personal representative of the latter. The Lord Chancellor observed "that it was the strongest proof of the husband's con-

sent, that the wife should have a separate property in the money arising by these savings, in that he had applied to her to lend him this sum, in which case he did not lay claim to it as his own, but submitted to borrow it as her money."

There can be no question, if the view we have taken of the law is correct, that if the slaves Sarah, Anna and Harriet, were purchased by the defendant in the life time of her husband with her separate estate or the proceeds of it, that a court of equity would regard them as standing in the same predicament in respect to the title, as the money that was paid for them. We have seen that in such case, if the wife is in the possession of personal property in which she has a separate estate, or in which the husband has conceded to her the exclusive title, she may after the husband's death successfully defend an action at law for its recovery by his personal representatives. The fact that Sarah was the joint property of the testator and his copartner is altogether immaterial in the present case. This action is not brought by the surviving partner for the purpose of vindicating any right of his own, but he sues as executor, asserting the title of the testator. Now although Goode may have been dismissed from the employment of A. B. & R. C. Puryear, previous to the sale of Sarah, yet it was entirely competent for A. B. Puryear to invest him with an authority to sell her generally, or to some person designated. It appears that the testator authorised Goode to sell her to the defendant; and that the latter purchased and paid for her—taking a bill of sale to her mother, professedly from A. B. & R. C. Puryear, by Goode. No question seems to have been made whether the defendant used the money of the testator or her separate funds. But conceding that the testator furnished the money and acquiesced in the sale and investment of the defendant's mother with the legal title, in trust for his wife, did he not thus part with the right to the slave, and can his executor now assert a title? Will not such a transfer operate as a post nuptial settlement, and even if voluntary be effectual against all persons but creditors and purchasers? If Sarah was paid for with the separate estate of the defendant, there would be no question of the superiority of her title, for a court of equity would uphold the trust in her favor, and her husband being dead, her possession would unite both

the legal and equitable title, and authorise her to maintain her right in any forum. True, a conveyance to a third person upon an implied trust that the property shall be held for the benefit of a married woman may not exempt the property from liability to the husband's debts; but when the husband himself sells property, receiving money from the wife, which he admits she is authorised thus to invest, and makes a bill of sale to a third person, he cannot after having consummated the transaction by a delivery, assert by suit its invalidity, and his executor or administrator does not stand in a more favorable position.

The charge that if the slaves Anna and Harriet were redeemed from Fisher with the money of the defendant, then the plaintiff could not recover, although they had not been settled to her separate use, assumes that where the husband uses the wife's money in the purchase of the property, the property at the election of the wife becomes a substitute for the money, and she will have the same title to it that she had to the money. Perhaps the charge assumes more than this as the alternative, viz: that the employment of the wife's separate estate, even in paying part of the purchase money, entitles her to hold the property at least until she is reimbursed. It cannot be known from the record, whether the testator redeemed Anna and Harriet, or whether they were redeemed by the defendant, or whether any and how much of her money was used in effecting that object. There was, however, evidence adduced which should have been refered to the jury in the solution of these questions. If the husband or his agent employed the separate funds of the wife in redeeming these slaves from Fisher, this would only give her a right in equity to subject them to her reimbursement; but could not *per se* invest her with the *legal title*, which is essential to the maintenance of the defence relied on. What may be the fact upon this point, perhaps may be ascertained with more exactness than we are at present informed; be this as it may, what we have said sufficiently indicates what principles are to control in the adjustment of this controversy. It results as a consequence that the judgment must be reversed, and the cause remanded.

DARGAN, J., not sitting.

VANDERVEER *vs.* ALSTON ET ALS.

1. Where a wife is the sole distributee of an estate, and the husband pays all the debts and takes possession of the assets without administration, claiming them as his absolute property by virtue of his marital rights, although the legal title is not thereby vested in him, yet he acquires such an equitable interest in the property as a Court of Chancery will protect as against those who, after the death of the wife, may seek distribution thereof as the next surviving kin of the intestate.

Error to the Chancery Court of Montgomery. Heard before the Hon. A. Crenshaw, chancellor.

THE bill in this case was filed by the plaintiff against the defendants in error, and makes in substance the following case Elizabeth Kelly died in 1838, intestate, possessed of several slaves and owing debts to the amount of $115 only. Benjamin G. Lathrop, who was the husband of a sister of the intestate and her sole distributee, immediately after the death of Mrs. Kelly, paid all the debts of the estate and took possession of the slaves, claiming them in right of his wife as his absolute property. After the death of Lathrop's wife, Lathrop, under the belief that it was necessary to perfect his title to the slaves, and with the view of accomplishing that object, procured Lewis Owen to administer on the estate of Mrs. Kelly, and pointed out the slaves to him as the property of the estate.—Owen, however, resigned in a short time after grant of administration, without having accomplished any act in execution of his trust. On the day that Owen resigned, the plaintiff in error, who had purchased the slaves from Lathrop, acting under the same belief and with a view to the same object that had influenced L., took out letters of administration *de bonis non* on said estate, and returned an inventory, embracing the slaves in question. Subsequently to these proceedings, the plaintiff filed his accounts for final settlement of the administration and distribution of the estate, and reported Lathrop as the sole distributee, whereupon the defendants in error came into court and suggested that they were the next of kin and entitled to the property, &c. Upon this state of facts the plain-

tiff resorted to Chancery for relief, but the Chancellor, being of the opinion that there was no equity in the bill, dismissed it, and his decree dismissing the bill is now assigned as error.

ELMORE and BELSER, for plaintiff in error:

1. At common law, neither creditors nor next of kin were entitled to the personalty of an intestate, and to remedy these evils the statutes of Westminster II., of 31st Edward III., and of the 22d and 23d Charles II. were enacted. Gresbrook v. Fox, 1 Plowd. 277 to 282; 1 Williams on Ex'rs, 236; 2 ib. 905; Hughes v. Hughes, Levinz, 533; Edwards v. Freeman, 2 P. Wms. 441.

2. These English statutes are of force in South Carolina, and administration is there required, and under these statutes, where there is *a sole distributee and no debts*, or the debts have been paid, and the property is reduced to possession, it is a vested interest, which cannot be defeated by subsequent administration, but will be protected in a Court of Equity. Henson v. Wallace, 1 Richardson's Eq. 22; Spann v. Jennings, 1 Hill's Eq. (S. C.) 324; Walker v. May, 1 Bailey's Eq. 58; Grimke's Public Laws, S. C., 81, 491. The same principle is recognised and acted on in Bogart v. Furman, 10 Paige, 496. Our statutes are more favorable to the distributees in terms, but it is possible may be construed in the same manner, and our own court has recognised the same principle. Clay's D. 168, § 2,—191, §1,—220, § 1; Eastman v. Miller, 11 Ala. 614; Bethea v. McColl, 5 Ala. 315.

3. Vanderveer is not estopped by his admissions on the records of the Orphans' Court, whatever may be his rights. Lefond v. Ricord, 1 Bailey's Eq. 487; Moore v. Hitchcock, 4 Wend. 292; Gamble v. Gamble, 11 Ala. 966; 7 Ala. 185.

FAIR & PRIOR, for defendants.

CHILTON, J.—In Kelly's Administrator v. Kelly's Distributees, 9 Ala. Rep. 908, it was held, that the grant of administration confers upon the administrator *de bonis non* a legal title to the goods and chattels, rights and credits of the intestate, which were unadministered by his predecessor; and a husband of the sole distributee of the intestate, who has paid

the debts of the estate and taken possession of the property, cannot resist a recovery by such administrator, by proving such facts. In that case, which came up on a writ of error to the Orphans' Court, this court further held, that the possession of Lathrop, the husband, who had paid the $115 which was due from Mrs. Kelly's estate, did not invest him with his marital rights in his wife's estate, *in a court of law*, and that if they ever attached, they were divested by the grant of administration and the designation of the property as the estate of the intestate. This decision clearly settles that *at law* Lathrop's possession and payment of the $115 due to creditors of Mrs. Kelly, the intestate, did not vest in him a title, and the question now presented is, whether these facts vest him with such an interest as will defeat *in equity* the claim of the heirs at law of Mrs. Kelly.

Our statutes in respect to executors and administrators do not form a complete system, and they must be considered as amendatory of, and suppletory to the provisions of the common law. Where then the statute is silent, we must resort to the common law to deduce rules for our guidance. It is correctly said by the counsel for the plaintiff in error, that at common law neither the creditors nor next of kin were entitled to the personal property of the intestate. In ancient times, such property was seized by the king, who, as *parens patriæ*, caused it to be preserved and disposed of for the funeral expenses, and the benefit of the wife and children, or if there were none, then for those of his blood. At a later period, the ecclesiastical courts were invested with this branch of the royal prerogative, but as the residuum, after deducting the *partes rationabiles* of the wife and children of the deceased, was taken under the name of *piores uses*, and withheld from the creditors of the estate, in 1285 the statute of Westminister 2d (13 Edw. I. c. 19) was passed, enacting that the ordinary should be bound to respond to the creditors of the deceased as far forth as his goods would extend, &c. Still the residuum, after the debts were paid, was left in the hands of the ordinary, to be disposed of as should seem proper to him. This defect in the law was remedied in 1357 by the statute 31st Edw. III., st. 1, c. 11, requiring the deputation by the ordinary of the next and most lawful friends of the deceased to administer his goods, and making them lia-

ble as executors to the ordinary. By the statute of 21 Henry 8, c. 5, passed in 1529, the ordinary was required to grant administration of the goods of the deceased to his widow or next of kin, or both, as he should think good, taking surety, &c. for the due administration of the goods, chattels and debts of the deceased. The security of the estate is further provided for by 22d and 23d Charles 2, c. 10. By the statute 29th Charles 2, c. 3, the husband who survives his wife is entitled to administration of her personal estate, which he did not reduce into possession during her life, and was authorised to retain the same to his own use, as though the statute of distributions had not been passed. We have thus refered to the origin of administrators and the several English statutes upon the subject, that it might be seen how far the adjudications of the English courts and the courts of such of the States as have in substance similar statutory provisions are applicable to our statutes. It is considered settled law in England, that if the husband survive his wife, then he as her administrator is entitled to all her personal estate which continued in action or unrecovered at the time of her death; and although the husband die before he has reduced her property into possession, his next of kin will be entitled to it in equity. The wife's next of kin are entitled to administration *de bonis non* of her estate not received by the husband, but they are held as trustees for the next of kin of the husband. See Roper's Husband and Wife, 205; 22 Law. Lib. 130; 1 P. Wms. 378-381; 3 Ves. 297; 3 Atk. 326; 14 Ves. 372; 8 ib. 49; 3 Mad. 45; 1 Jac. & Walk. 388; Stewart v. Stewart, 7 Johns. C. Rep. 244; Wms. Ex'rs. 242, 910-11. In Tennessee, where they have no such provision as that contained in 29 Charles 2, the Supreme Court nevertheless hold, that the husband is entitled, not as next of kin, nor from the statute of distributions, but as husband and in right of the marriage as owner—Hannico v. Lard, 10 Yerg. 222-23; 1 Yerg. 418; and such is the doctrine held by several of the States. In this State, however, a different doctrine has from an early period prevailed. Mayfield v. Clifton, 3 Stew. Rep. 375; Bibb v. McKinley & Hopkins, 9 Port. 636; Johnson, adm'r, v. Wren, 3 Stew. 172. These citations are sufficient to show that, according to the settled doctrine of this court, the husband is not entitled to the slaves, unless he had

reduced them into possession during the life of the wife. We think, however, the facts of this case, as we shall presently show, are sufficient to vest in the husband the equitable right to them.

This bill is filed by the administrator of Mrs. Kelly, alleging that the husband's interest vested in him by purchase, and seeking to interpose that interest in his own behalf against the next of kin of his intestate, to enjoin the account which they demand of him as administrator. While the wife was living, (she being the sole distributee,) the husband took the property into his possession as husband, and having paid all the debts due from the estate of Mrs. Kelly, claimed to hold it as his absolute right, and to dispose of it as his own. We may lay out of view the subsequent acts of the husband in procuring the appointment of an administrator, under the mistaken view that it was necessary to the repose of the title that an administrator should be appointed. That Lathrop pointed out the property and caused administration to be granted on the estate cannot operate to estop him, except as to the parties who have been induced to act upon his representations and thereby to place themselves in a worse condition. This party would be the administrator, but he waives the estoppel, if there was one, and insists upon the complete equitable right of the husband. If the property in equity really belonged to the husband, the next of kin of Mrs. Kelly have not in any manner been prejudiced by the taking out of administration or the pointing out the property as belonging to the estate. The bill must be taken as true on the motion to dismiss for want of equity, and the proceeding insisted upon, as showing that the property belongs to the estate, is therein charged to have been instituted through mistake, and for the purpose of confirming the title of the husband, and not of destroying it.

Now, after the payment of the debts due from Mrs. Kelly's estate, the property which remained belonged to Lathrop in right of his wife. He paid the debts and took the property, but failed to administer. He did not thereby acquire the legal title to the property, for this can only be acquired by and through an administration; but did he not acquire a complete equity in it? There is no controversy about his right to it, had he paid the debts in due course of administration, and

thus asserted his marital rights over it. Besides representing his wife who was next of kin, the statute gave him the right to the administration. The objection is, that he did not pursue the form which the law has marked out, so as to make his title complete, and that as the administrator has the right at law to recover, the Chancery Court has no power to arrest the action of the Orphans' Court, but that the property must be distributed among the next of kin living at the time of the distribution. In other words, that the possession of Lathrop, the husband, was unauthorised by law, and tortious as against the administrator, the grant of whose letters related back to the death of the intestate, and cannot therefore give him an equitable title.

It is very clear that in such case no one could be damaged but the creditors of the intestate, and the bill charges, all these have been fully paid off and satisfied, and hence the case is not distinguishable in principle from one where there are no creditors. In such case, it seems to me that administration would be a useless formula, as was held by the South Carolina decisions referred to by the counsel for the plaintiff. See also the cases of Bethea v. McCall, 5 Ala. Rep. 315, and Miller v. Eastman, 11 Ala. Rep. 614, where a similar doctrine is countenanced. In the case last cited, the court say: In courts of equity, where it is not necessary that the legal title should be vested in the plaintiff, an administration may be dispensed with, where the right is asserted by those who would be entitled to distribution, and where it is clear that there are no creditors to be prejudiced. Such was the decision of Bethea v. McCall, 5 Ala. Rep. 315. In Henson v. Wallace, 1 Rich. 22, the former adjudications are reviewed, and the doctrine is laid down that it is unnecessary in cases where there are no debts and a sole distributee, to have an administration upon the estate, but that in equity the title will vest. In Spann v. Jennings, 1 Hill's Ch. Rep. 324, Chancellor Harper, upon the authority of Marsh v. Nail, previously decided by Chancellor Desaussure, held the same doctrine. "To what purpose," says he, "should the husband have administered? There were no debts to pay, and no distribution to make. That would have been going through a mere nugatory ceremony. Or if any other person had administered, could the property have been

recovered from him? No. By going into equity, and showing there were no debts, and that his wife was exclusively entitled, a recovery at law would have been restrained." The justness and reasonableness of this doctrine certainly commend it to our approbation.

In this case, the creditors make no complaint; they are, as we have said, satisfied. The collateral relatives of Mrs. Kelly had no right to complain; for none of the property was going to them. So that unless some principle of public policy was violated in taking possession without administration, the husband by his possession became vested with the equitable right to the slaves in controversy; and although at law his marital rights did not attach so as to defeat a recovery by the administrator subsequently appointed, yet in equity he is the beneficial owner, and his claim must controvert the mere legal right of the personal representative. In case of a sole distributee, the claims of creditors aside, I see no principle of public policy requiring the party to push the property through the diminishing process of administration. The State asserts no claim to seize upon the property, as the king in ancient times was wont to do, that as *parens patriæ* he might dispose of it as he listed. Two questions only concern the chancellor in such cases—1st. Is the possessor the sole owner? 2d. Are there no creditors of the estate, and no charge upon the property? If he hold it thus free from all demands, he should not be required to deliver it to an administrator, that it might be delivered back to him less the expenses. This would be not only unjust, but a useless ceremony. 14 Ala. Rep. 802. Johnson & Co. v. Spaight, 14 ib. 27, is not opposed to this view. In that case there were several distributees, and the proceeding was at law to subject the husband's interest which accrued in right of his wife, to process of garnishment, before distribution. Having determined that Lathrop held the equitable title to this property, and that the fact, that he pointed it out as property belonging to the estate with a view of obtaining for his vendee a legal title, and not of parting with his equity, did not confer upon the persons, claiming to be the distributees of Mrs. Kelly, a right to the property, they not having been in any way affected by the proceeding,—it results that the complainant, who occupies the place of Lathrop, having

purchased his interest, is entitled to be protected in equity against the claims of the defendants, and the bill was therefore improperly dismissed.

Decree reversed and cause remanded.

TURNIPSEED *vs.* CUNNINGHAM.

1. Courts of Equity incline against conditional sales, and where it is doubtful from all the circumstances attendant on a transaction, whether a conditional sale or a mortgage was intended, Equity will treat it as a security merely.
2. Where it is doubtful whether a transaction was intended as a conditional sale or a mortgage, it is the duty of the purchaser, who insists upon the former, to show clearly that such was the intention of the parties at the time of the transaction.

Error to the Chancery Court of Pickens. Before the Hon. David G. Ligon, chancellor.

ORMOND & HUNTINGTON, for plaintiff:

1. A deed absolute on its face will not be declared a mortgage, or conditional sale, but on the most stringent and conclusive proof. The early cases in this court declare the law, that a contract absolute on its face may be shown by parol to be a mortgage or conditional sale. Subsequent cases limit and explain the doctrine broadly asserted in the earlier decisions, as will be seen by an analysis of the cases of Eiland v. Radford, 7 Ala. 727; McKinstry v. Conly, 12 Ala. 678; Freeman v. Baldwin, 13 Ala. 246, and Chapman v. Hughes, 14 Ala. 218. See also Robinson v. Cropsey, 2 Edw. Ch. 138.

2. The answer denies that a mortgage was intended, but admits that the complainant had the right to repurchase, and there is but one witness, the son of the complainant, who proves that it was intended as a mortgage. The evidences of debt were all cancelled and *delivered up* to the complainant. The weight of the evidence is decidedly in favor of the answer, that it was an absolute sale with a right of *repurchase*. See also Goodman v. Grierson, 2 Ball & B. 274, to the effect

that there can be no mortgage where the remedies of the mortgagor and mortgagee are not mutual and reciprocal. In the case at bar, the notes having been paid and delivered up, Turnipseed could have had no action for the consideration if the negroes had died.

3. The only ground which Cunningham sets up for relief is, that Turnipseed has chosen to treat as absolute bills of sale which were made absolute for the purpose, confessedly, of defrauding the State of her just revenue. By the bill itself, therefore, the parties being in *pari delicto*, neither can obtain aid from a court of chancery.—2 Story's C. Eq. 45; Hannay v. Eve, 3 Cranch, 242; Fambro v. Gantt, 12 Ala. 298; Weaver v. Whitney, Hopk. Ch. 11.

4. Money paid in pursuance of an usurious contract cannot be recovered back, (see pamphlet acts of 1844,) and equity will not aid a man in doing that indirectly which the law does not permint him to do directly.

5. In McKinstry against Conly, (*ut sup.*) the court lay great stress upon the fact, that before the conditional sale was entered into, a mortgage in fact existed, and asked where was the necessity of a new mortgage. Here there was a deed of trust covering four hund ed acres of land and sixteen negroes, of which deed the law day had arrived—whence, then, the necessity of a new mortgage which is a less stringent remedy for the collection of debts?

6. If the parties intended a conditional sale, their intention will be carried out: to refuse to enforce it when they contracted in that view, would be, in the language of the court in Conway v. Alexander, Cranch, to "assume the guardianship of adults."

Peck, for defendant:

1. As to the character of the transaction as disclosed by the answer.—1st. It admits that the relation of debtor and creditor existed between the parties at the time of the alleged sale. 2d. It admits the plaintiff in error did not wish to purchase the slaves—did not wish to invest his money in that way; had no use for the slaves. 3d. It admits that the prices fixed upon the slaves were not equal to their true value. 4th. The criterion adopted for the hire was not the value of the services of

the slaves, but the profits which Turnipseed thought he ought to demand and receive upon his investment.

2. If the answer leaves the question, whether the transaction was intended as a conditional sale or mortgage, in doubt, the testimony fully establishes it to be a mortgage.

3. Where it is doubtful whether a transaction is a mortgage or a conditional sale equity construes it a mortgage.—4 Kent's Com. 144, and cases cited in note; May v. Easton, 2 Porter, 421; 1 Dev. Eq. 372; 2 Sumn. Rep. 535. So too, where it is doubtful whether a sale is absolute or a mortgage, if the property is of much greater value than the price paid, it will be held to be a mortgage. Todd v. Hardie, 5 Ala. 698; ib. 9 24.

DARGAN, J.—The material allegations of the bill are, that the complainant Cunningham, was indebted to the defendant in several promissory notes, to secure which, a deed of trust had been executed by the complainant to Edmund T. Bush; that the defendant on the 23d of March 1843, claimed to be due to him the sum of six thousand eight hundred and twenty-five dollars; that this amount was produced by calculating interest on the debt at sixteen per cent, and compounding it from time to time; that the defendant then stated that the Legislature had passed a law taxing money loaned at interest, or used in shaving, and that he wished to change the character of his debt, and proposed to give up the deed of trust and the notes, and to take bills of sale for twenty-four negroes, assuring the complainant that he would hold the bills of sale as a security for the debt, and that the slaves should remain in the possession of the complainant, and that he would take a note purporting to be for the hire of the slaves, but intended in fact as a security for the interest. The bill further charges, that confiding in the assurances of the defendant, that he would take no advantage of complainant, he executed to him five bills of sale, purporting to convey the slaves absolutely, and that the defendant then delivered up the deed of trust and the notes to complainant, he at the same time executing his note to the defendant for the sum of eight hundred and eighty-eight dollars and ninety-nine cents, purporting to be given for the hire of the slaves, but which was intended to

secure usurious interest on the debt due by complainant to the defendant. It is further alleged, that on the 22d May 1843, the complainant executed to the defendant another bill of sale for a negro named York, the consideration expressed being four hundred and fifty dollars, which, however, was executed on the same terms and conditions, and on like assurances. The consideration for this bill of sale was money paid by defendant to different persons, at the request of the complainant. The bill further alleges, that on the 2d day of March 1844, the day after the note for $888 99 became due, the defendant induced the complainant to execute another note, purporting to be for the hire of the slaves, but intended to secure usurious interest, which was for the sum $956 99, and which included sixteen per cent on the amount, expressed to be in payment of the slave York. It is further charged that the amouut actually due, including lawful interest, after allowing credits for two payments, is about five thousand three hundred and ninety eight dollars and seventy cents; and that after the last note fell due, the defendant in violation of his assurances commenced actions at law, to recover the possession of the slaves and the amount purporting to be due for the hire. The bill concludes with a prayer that the bills of sale be decreed to be mortgages; that an account be taken of the amount actually due with lawful interest, on the payment of which the bills of sale to be cancelled, and also for injunctions against the suits at law, and for general relief.

The answer admits that complainant was indebted to the defendant, to secure which the deed of trust described in the bill was executed; the complainant had made default in paying the notes as they fell due, and that the defendant was about to proceed to have the property sold; and avers, that the complainant, desirous to prevent his land conveyed by the deed from being sacrificed, proposed that the defendant should pay off some executions then against him, amounting to about one thousand and thirty-six dollars, and give up the notes and deed of trust, and that he would sell to the defendant absolutely, negroes to satisfy his demand:—that to this proposition the defendant agreed, but told the complainant, that he preferred the money to the slaves, as he had no land for them to work; that complainant replied he was willing to

hire them of respondent; that the defendant then went to the house of the complainant, and the negroes were valued by them, and after the valuation, defendant said to complainant that if he would, at any time, previous to the first of March 1845, pay the sum agreed on as the value of the slaves, and the stipulated hire, he might have the negroes back,—but he denies that the bills of sale were intended as mortgages, or to secure the payment of a debt, or that there was any promise or undertaking on the part of the complainant to repay to the defendant the purchase money on the valuation set on the slaves. It is also denied that the notes, purporting to be given for the hire of the slaves, were intended to secure usurious interest on the debt, but it is insisted that they were intended to secure the hire of the slaves, as they purport to do. It is likewise denied that the bill of sale for York was intended as a mortgage, but it is insisted that the sale was absolute, with the same right on the part of complainant to repurchase him that he had to repurchase the others. It is admitted that the hire of the slaves was ascertained by a certain per centage on the sums agreed to be given for them; that this was twelve and a half per cent on the amount that complainant previously owed to the defendant, and sixteen per cent that the defendant then advanced for the complainant; but it is averred that this criterion was not adapted to secure usurious interest on a debt, but as a criterion by which the value of their services or hire was ascertained. The answer also admits that the defendant had reserved and agreed to take usurious interest on the debt due him, and this usurious interest formed a portion of the indebtedness of the complainant to the defendant at the time the bills of sale were executed. The answer also avers, that on the first of March 1844, the complainant, at the request of the defendant, brought the slaves to the residence of William Ellis, and there, in the presence of witnesses, made a formal delivery of them to him, by placing his hand on one, and saying, I deliver you these slaves as your property, after which the complainant again hired them for a year, ending the first of March 1845.

In addition to the admissions in the answer in regard to the right of the complainant to repurchase, the testimony clearly shows, that on the day the slaves were brought to the house

of Wm. Ellis, and after the complainant had announced that he delivered them to defendant as his property, the defendant deliberately stated to those who had been requested to witness the delivery, that the complainant had the right to redeem one or all of the slaves for his own benefit, or for the benefit of his family. The transaction must therefore have been either a sale with the right to repurchase, or a mortgage; and on the solution of the question, whether the bills of sale were intended as mortgages to secure the amount of indebtedness due from the complainant to defendant, or whether they were intended to be absolute, with the right of repurchase merely, depends the equity of the bill, and the rights of the complainant.

Courts of equity are said to incline against conditional sales, and where it is doubtful, from all the circumstances attendant on the transaction, whether a sale, with the right to repurchase, or a mortgage was intended, equity will construe it to be a mortgage, for by this construction, complete justice can be done to both parties; but in cases of conditional sales, oppression can be frequently exercised over the needy, and unjust advantages taken of them, owing to their distressed or embarrassed condition.—Flagg v. Mann, 2 Sumn. 535; Longust v. Scaman, 1 Ves. 406; 5 Little, 84; Poindexter v. McCowan, 1 Dev. Eq. 373; Powell on Mortgages, 139; 2 J. J. Marshall Rep. 471. It is therefore the duty of the purchaser, who insists that the sale was absolute, with the right of repurchase, and not a mortgage, clearly to show that such was the intention of the parties; if the proof leaves it doubtful whether the one or the other was intended, a court of equity should decree the contract a mortgage. Weighing the evidence and the entire case by this well settled rule, in my opinion, the bills of sale must be declared mortgages, for any mind, viewing the whole case deliberately, must doubt whether the bills of sale were to be absolute, with the right to repurchase, or whether they were intended as mortgages, even if it be not convinced beyond doubt, that a mortgage alone was intended.

The slaves are shown to be worth nearly double the sum fixed on them as their value, and this of itself must always be an important fact in determining whether a sale is absolute, or a mortgage. The complainant was the debtor of the de-

fendant, and to secure this debt, a deed of trust had been executed on the property of the complainant, default in the payments had been made, and the defendant had given notice that he intended to sell. The agreement was then entered into between the parties by which the defendant was to advance a further sum of about a thousand and thirty-six dollars to satisfy executions then existing against the complainant, and also to give up the notes he held on complainant, together with the deed of trust, and in lieu thereof, the defendant was to receive bills of sale for twenty-four or five slaves. But there was no witness to the agreement; it rested with the parties themselves. The answer shows that the agreement was fully understood and complete as to all its terms before the day on which the bills of sale were executed, and on that day nothing was said in reference to the value of the slaves, for they had been previously valued; nor was any thing said in reference to the hiring of the slaves, but the note for hire was drawn and executed in pursuance of the previous understanding. This note, which purports to be for the hire of the slaves was, not regulated as to the amount by the value of the services of the slaves, but by a certain per centage on the amount of indebtedness to the defendant; at the expiration of the year, the complainant, in the presence of witnesses, declares that he delivers the slaves to the defendant as his property; the defendant then calls on the same witnesses to witness that the complainant had the right to redeem one or all of the slaves, and another note is taken for hire, the amount of which is regulated by the same rate of interest on the amount of the debt. The conduct of the parties from the time the bills of sale were executed, tends strongly to show that they considered the slaves as bound for the debt, otherwise their hire it would seem would have been to some extent regulated by the value of their services; but the hire of York, a likely boy about 19 years old, is estimated at 16 per cent on $450, and the hire of the others is estimated in the same manner, whether they were able to perform services or not. In addition to these circumstances, James Cunningham, the son of the complainant, states in his deposition, that when the slaves were brought into the yard to be valued, he inquired of the defendant the meaning of it, who replied that the notes he held on

his father were due, and the money was taxable, and that he was going to fix certain prices on them and *take forms* of bills of sale, and by so doing he would avoid the taxes on the notes, and that witness need not give himself any trouble about it.

Under this proof we find so many *indicia* of a mortgage, that we must so consider the transaction, notwithstanding the notes and the deed of trust were delivered up to the complainant by the defendant, on the execution of the bills of sale. The relation of creditor and debtor existed between the parties at the time of the transaction; the value of the property is nearly double the amount agreed to be given, and the possession continued with the vendor, under a contract of hire, as the defendant insists; but this contract of hire seems to have been a part of the contract of purchase, and the sum agreed to be paid by way of hire is a certain per centage on the amount of the debt.

These *indicia* of mortgage, connected with the declarations of the defendant, deliberately made, that the complaint had the right to redeem the slaves in the presence of men called on to witness the formal delivery of the slaves, fix the character and nature of the transaction, and require that the bills of sale should be considered in a court of equity as a security for the amount that may be due from the complainant to the defendant.

It is however urged that no debt existed after the delivery of the notes and deed of trust to the complainant—but a debt may exist notwithstanding there is no bond, covenant or note to prove it. So if there had once existed a bond or note as evidence of the debt which was delivered up or cancelled, yet the debt would exist if it were not the intention of the parties to annul or extinguish it. It is true, the inference arising from the fact of giving up or cancelling the evidence of debt, would be, that the parties intended to annul or extinguish it; this inference, however, may be repelled by proof that such was not the intention of the parties.—McKinstry v. Conly, 12 Ala. 678. In the case of Flagg v. Mann, 2 Sumn. 535, Judge Story said, that the absence of a covenant to pay the debt may, in some cases, be important in ascertaining whether a transaction is a mortgage or a conditional sale, but within itself is not conclusive; the true question is whether there is a

subsisting debt between the parties capable of being enforced *in rem* or *in personam*. The evidence in this cause is sufficient to repel the inference that the parties intended to extinguish the debt, and induces us to believe, that after the execution of the bills of sale, both the plaintiff and the defendant considered that there was a debt due from the complainant, to secure which the bills of sale were executed, and that the complainant had the right to redeem the slaves by paying it. This we think is a fair construction of the contract; and by this view of it, complete justice can be done to both parties. To hold that the contract was an absolute sale, with a right to repurchase, would enable the defendant to gain an unjust advantage over his debtor by the contract, when all must admit that it is doubtful, *to say the least of it*, whether it was intended as a mortgage or a conditional sale. The chancellor held the bills of sale to be mortgages, and such we are bound to consider them.

The decree must therefore be affirmed.

HODGES *vs.* WISE & WIFE, ET ALS.

1. If a complainant neglects, for more than five years, to adopt those measures necessary to bring the defendant properly before the court, it is not error in the chancellor to dismiss his bill.
2. Neither the English practice of setting down a cause for hearing at the next term after publication, and issuing a subpœna *ad audiendum judicium*, nor that of speeding causes, has ever been adopted in this State.
3. Where a parent and child are both made parties defendant to a bill, the mere service of subpœna on the parent is insufficient to bring the infant before the court. It should specially appear by the officer's return that a subpœna was served on the *parent for the infant*.
4. A guardian *ad litem* cannot be appointed for an infant defendant, until the infant has been properly brought before the court, in one of the modes prescribed by our rules of practice. Such appointment, made before the infant is thus brought in, is entirely nugatory.

Error to the Chancery Court of Fayette. Heard before the Hon. Wilie W. Mason, chancellor.

The bill in this case was filed on the 9th of March 1843, by the plaintiff against the defendants in error, three of whom were infants. The record does not shew, that service was ever perfected on the infant defendants otherwise than by delivering a subpœna to their mother, who was also a defendant to the bill. The remaining facts appear in the opinion of the court. The chancellor dismissed the bill at the hearing, because of the long delay of the complainant in bringing the defendants therein properly before the court, and this is now assigned as error.

T. M. Peters for plaintiff in error, made the following points:

1. The 28th rule of chancery practice did not authorise the dismissal of the plaintiff's bill. That rule only applies where there has been a total want of prosecution after filing the bill until the second term of the court has elapsed.—Clay's Dig. 615, rule 28. But here, the proper measures were immediately taken to bring in all the defendants. Subpœna was issued and served on all the parties within the jurisdiction, in the manner required by law.—Clay's Dig. 351, § 34; 8 Ala. 605. In case of infant defendants, service of subpœna on the father, mother, father-in-law, guardian or other person having care of the infants, is good. Here subpœna was served on the mother, the only parent in life, who was also guardian, and on the father-in-law of the infant defendants—this was sufficient to bring them into court.—Clay's Dig. 612, rule 3; 2 Atk. 70; 8 Ves. 141; 1 Smith's Ch. Pr. 110–115; 1 Daniel's Pr. in Chan. 563, § 5, *passim;* 8 Ala. 605.

2. The infant defendants being before the court, the next step is to appoint a guardian *ad litem.* This may be done by the chancellor in term time, or in vacation, or by the master in vacation; and it is the English practice to refer the appointment to the master.—Bennet's Pr. in Mas. Office, 4 Law Lib. No. 27, p. 10, 1842, 3d series; Clay's Digest, 357, § 81; ib. 355, § 62; ib. 615, rule 24; ib. 617, rule 41; ib. 349, §'s 17 & 20, and this is only repealed as to injunctions—ib. 357, § 81, *supra.* If the register appoints it is sufficient until annulled or modified by the chancellor; and especially as it seems in this case, when after service of subpœna, the infant defendants are removed beyond the limits of the State.—Clay's Dig. 617,

rule 41. If this guardian *ad litem* does not file answers for the infants in proper time, it is the *duty* of the chancellor to direct the register to file formal answers for the infants, even at the hearing.—Clay's Dig. 617, rule 41; see also 1 Ala. 370, 389, 390; 1 Daniel's Pr. in Ch. 220, *et seq.* 1 Smith's Ch. Pr. 91; 255, marg. p.

3. Besides, the peremptory dismissal of bills, except for *intentional and wilful* neglect to proceed, after the parties have incurred great expense and costs, is not encouraged by courts under the guidance of an intelligent discretion: it is extremely odious in the sight of justice, and the English courts, the practice of which ours professes to adopt, did not allow it after *publication passed.*—Blake's Chan. Pr. 217; 2 Mad. 390; Skip v. Warner, 3 Atk. 558. And whenever there is a motion made for this purpose, (previous notice was *allowed* to be necessary,) and upon the increase of intelligence in courts of chancery, has been long since required; and if the party complained of was ready to enter into "the usual undertaking to speed the cause," time was invariably allowed for this purpose.—Blake's Ch. Pr. 216, 220, and forms and authorities there given; 1 Smith's Ch. Pr. 332; Beam. Ord. 207; 1 Smith's Ch. Pr. 316, *et seq.*; 2 Daniell's Ch. Pr. 356, *et seq., passim*, § 2; Clay's Dig. 618, rule 51; Beam. Ord. 11; 2 Mad. 296, 297, 298; 1 Barbour's Ch. Pr. 215, *et seq.;* Findlay v. Wood, 1 Ves. & Bea. 499; Jackson v. Perceval, 16 Ves. 204. See also the numerous cases cited in 2 Daniell's Pr. in Ch. § 2, c. 17, 356 to 386, and also 10 Ala. 702, 745, 746; 12 ib. 580, 487; 9 Ala. 460, 461. In this case, the chancellor refused to retain the cause and have the minors *brought* in, in his own way, or to permit the register to file formal answers for them under the 41st rule of chancery practice. The evils of such a course of conduct need not be portrayed. The infant defendants and all the parties except Aaron and W. W. Wood, are residents of this State; Aaron and W. W. Wood, are non-residents.

W. Cooper, *contra.*

CHILTON, J.—This cause was regularly submitted for a decree in the court below. The depositions were published and the cause being investigated by the chancellor, he decreed that the bill should be dismissed, as the infant heirs or child

ren of Bennett Wood, deceased, whose estate was sought to be subjected to the payment of the complainant's demand, had not been brought before the court.

It is not denied but that the infants are proper parties to the bill, which seems to have been very correctly framed, and to which they were made defendants, but it is insisted by the counsel for the plaintiff in error—1st. That the 28th rule of chancery practice, under which the bill was dismissed, did not warrant the chancellor in thus dismissing it; and it is supposed that the rule only applies when there has been a total want of prosecution after filing the bill until the second term of the court has elapsed. The rule alluded to declares, "that if the complainant shall not before the second term after filing his bill, have taken measures to bring in the defendant, his bill shall be dismissed."—Clay's Digest, 615, § 28. The plain object of the rule was to avoid delay, and to compel complainants to have their causes ripe for hearing by the second term, at least so far as to have taken measures for bringing in defendants. This object would be defeated if the taking measures to bring in one of several defendants should relieve the party from the operation of the rule in respect to others; or if he could obtain an exemption by resorting to measures to bring in the parties not recognised by law, or the practice of the court, and which prove ineffectual. The rule is a salutary one, and if properly enforced, will, in my judgment, contribute much to relieve the courts of chancery of the complaints too often with justice urged against them, of delays in their proceedings. The rule should not therefore be lightly regarded. The bill in the case before us was filed on the 9th day of March 1843; it was dismissed on the 17th day of July 1848. Here then was the lapse of more than five years between the time of the commencement of the suit and the period when it was brought to final trial. Certainly the complainant had ample time to prepare it for hearing, and to have brought the parties, who were known to him to have been necessary, when he filed his bill, properly before the court; and if he has failed to do this, it is in our opinion entirely correct that the chancellor should have dismissed his bill.

2. Neither the English practice of setting down a cause for hearing at the term after publication is made and issuing a

subpœna *ad audiendum judicium*, nor that in respect to speeding causes, &c., has ever been adopted or followed in this State. Our statute requires that "in all cases where the answer is filed ten days before the sitting of the court, or the bill is taken *pro confesso* for want of an answer, the cause shall be heard and determined at that term, if practicable, unless on good cause shown, either party may continue the same." Clay's Digest, 351, § 38. No notice is required as to the term the cause will be heard. The law fixes this, and causes in chancery stand upon the chancery docket for trial at the next term after the bill is filed, if the subpœna has been served upon the defendant thirty days before the commencement of the term, for he has that period within which to answer or demur to the bill. Ib. § 35.

3. But the counsel for the plaintiff in error insists that the infant defendants were served with process of subpœna according to the third rule of chancery practice.—Clay's Digest, 612, § 3. That rule provides that subpœnas issuing against infant defendants may be served on their parents, or either of them if in life, and in case of death, upon the general guardian of such infants, and if there be none, then if the infant be over fourteen years of age, upon the infant personally, and if under fourteen years, then upon such person as may have the maintenance and charge of such infant," &c. It is contended by the counsel, that in the case at bar the subpœna was not only served upon the mother, who had charge of the infants, and who had been appointed their guardian in Texas, but also upon her husband. True, they were each served with process of subpœna; but they were each made defendants to the bill, and the sheriff did nothing more than serve the process on them individually, and not on them as the guardians or persons having the custody of the infants. He does not return that he served or executed the process on them for themselves and as such guardians; no subpœnas or copies of the bill were left for the infants, and I apprehend no case can be found where such service has been held sufficient to bring the infants before the court. It may be replied that it would subserve no good purpose to leave copies of the subpœna and of the bill with the mother for the infants, as not being able to defend for themselves, the copies could be of no use to

them, and their guardian was in possession of a copy of the plaint and process. A sufficient answer is, that the statute requires the subpœna issuing against the infant to be executed on the surviving parent; that leaving a copy by the sheriff of the subpœna and bill, was, at the time of the service here made, the mode of executing the process—besides, thus serving the process notified the parent that the infants were brought before the court by the execution of the process on her, or her husband. Nothing however of the kind was done in this case. The sheriff says nothing in respect to the infants, nor as to W. W. Wood and Aaron Wood, both of whom were likewise embraced in the same subpœna. It should appear that the subpœna was served upon the parent for the infant, and the service upon the parent alone who is a party, and required to be served, is not such a compliance with the law as will bring the infant defendants before the court. The case of Hollinger and Wife v. The Branch Bank at Mobile, 8 Ala. 605, where it was held unnecessary to serve a subpœna upon a married woman, unless she has a separate estate, and that service upon the husband alone was sufficient, is unlike the case before us. The husband is responsible for the default of his wife in failing to answer jointly with him in ordinary cases, and for this reason, may well be considered as the only party necessary to be served with process—Daniel's Ch. Pr. 535–548; but it is not so in case of infants. The parent is not bound to put in an answer for them, but the court will see that their rights are protected by the appointment of a suitable person, guardian *ad litem;* and it is clearly irregular to appoint a guardian before they are brought before the court by some of the modes prescribed by our rules of practice. Walker, et al. v. Hallett, 1 Ala. 379; Walker, et al. v. The Bank of Mobile, 6 Ala. Rep. 452. Inasmuch then as the infant defendants were not before the court, and no guardian *ad litem* could properly have been appointed for them, it follows that the order made by the register, appointing Mr. Jackson, was nugatory, and did not have the effect of dispensing with service upon them. The order of the register does not purport to have been predicated upon any service effected upon the infants personally, or upon any one else for them, but upon the ground that they were non-residents of the State. If such was the

case, it is very clear that publication must have been made against them as in case of adults, before the decree could bind them. Walker v. Bank of Mobile, 6 Ala. 452.

The complainant then in the court below went into the trial before his case was ripe for hearing; necessary parties, parties who in the event of a decree, must contribute to its satisfaction, and whose effects were sought to be condemned by the bill, were not before the court, and no regular decree could have been pronounced by the court in their absence. In this posture of the case, the court was either bound to proceed and try the cause and render a decree against the parties before it, which would have been clearly irregular, or to continue the cause for another year, when it had already been, as we have stated, continued for more than five years, and when the defendants, for aught that appears of record, had the clear right to have it finally disposed of, or to dismiss the cause from the docket for want of prosecution as to the infant defendants, as was done. We feel no hesitation in saying that the chancellor pursued the correct course.

It is certainly true that the objection for improper parties, or the want of parties, must be taken before the final trial, or the court will not dismiss the bill, but order it to stand over, if the omission of the complainant has not been fraudulent or wilful, that the proper parties may be made and brought before the court either by amended or supplemental bill. Rugely, et al. v. Robinson, 10 Ala. Rep. 702; Alderson v. Harris & Merrill, 12 Ala. Rep. 734. In this case, however, the defendants could take no advantage of the failure of the complainant to bring in the infant distributees of Wood otherwise than by motion to dismiss, for the bill prays process against them, and that they be made defendants. It is unlike those cases where new parties are to be brought before the court, and who are discovered pending the progress of the cause. These parties being necessary (Julian, et al v. Reynolds 8 Ala. Rep. 680) and known to be so by the complainant when he filed his bill, and no reason appearing why the complainant had not brought the parties defendants properly before the court, we think after the lapse of so long a time, and after he has submitted his cause for final decree, then to keep the defendants a year longer before the court until the infants can

be served or publication made and guardians *ad litem* appointed, would be to sanction a practice unauthorised by any rule which has been adopted, and would certainly go farther than any adjudicated case in this State has gone. The court *proprio jure* was not bound to continue the cause, and no ground is shown which in our opinion would have justified a continuance.

Let the decree be affirmed.

LEE *vs.* DAVIS ET AL.

1. Where, on an application to set aside a sale under execution, the judgment entry recites "that the petition, answers, and *affidavits* of the respective parties were in file and submitted, and that upon an inspection and consideration of these, the rule &c. was discharged," are not the affidavits filed on behalf of the petitioner to be regarded as a part of the record?—QUERE.
2. The omission of the sheriff and attorney of the plaintiff in execution, the latter of whom becomes the purchaser, to undeceive one who at the sale asserts a superior title to the property sold, and who has had no notice of, but is evidently ignorant that the judgment and execution under which the sale is about to be made create a lien prior in point of time to his title, coupled with gross inadequacy of price, is a sufficient ground for setting aside the sale.
3. Where the injury complained of is in *the execution* of the process and not for defect in the process itself, it is competent for any person whose interests are thereby prejudiced to move to set aside the sale.
4. The fact that the execution, under which a sale is made, has not been returned to the court whence it issued, interposes no objection to its entertaining a motion to set aside the sale.

Error to the County Court of Mobile. Tried before the Hon. John A. Cuthbert.

THIS was a rule sued out by the plaintiff against the defendant in error and the sheriff of Perry county, to show cause why a sale of certain lands, to which the plaintiff claims title and of which he held the possession, made by said sheriff under an execution issued on a judgment rendered in the County

Court of Mobile in favor of the Branch of the Bank of the State of Alabama at Mobile against one A. B. Hopkins, should not be set aside. It appears from the petition, answer and affidavits, that on the 1st November 1841, said Hopkins executed a deed of trust for the benefit of creditors, in which he provided first for the payment of all unsatisfied jndgments then existing against him; that all of said judgments had been discharged except the one in question, and that this one had never come to the notice of the trustees; that the lands, which the sheriff afterwards sold, were disposed of and conveyed by the trustees to the plaintiff at the price of $8,500, about three years before the sheriff's sale; that in October 1846, said lands were levied on by the sheriff by virtue of an execution issued on said bank judgment, (which judgment was older than the deed of trust,) and sundry other executions issued on judgments junior to said deed of trust; that the lands were advertised as levied on under one of the executions last referred to, and "others," without naming the bank execution; and that at the sheriff's sale neither the sheriff nor the defendant, who was the attorney of the bank and had placed its execution in the sheriff's hands, notwithstanding the plaintiff and those who had warranted his title publicly proclaimed to the bystanders that none of the judgments and executions under which the sale was about to take place created a lien on the lands, but were junior to the title under which plaintiff claimed, undeceived them or informed them of the existence of the bank judgment. Under this state of facts, the lands were bid off by the defendant at the sum of $500, and were shown to have been worth at the time $8,000. The bank execution had not been returned to the County Court of Mobile, having been used and filed in the Circuit Court of Perry in a similar proceeding to set aside the sale under all the executions, and was consequently not produced on the hearing of this cause.

The County Court of Mobile discharged the rule, and the plaintiff now assigns its judgment as error.

Campbell & Peck, for plaintiff:

1. The writ of *audita querela* lies to correct the abuse of final process. It is a writ in the nature of a bill of equity, and the equitable rights of parties and privies to the record will be

secured by it. 2 John. Cases, 227; 10 Mass. 101; 1 Comyn's Dig. 785; Fitz-Herbert's Nat. Brev.

2. The purchaser of lands is such a privy, that he is entitled to this writ. 2 John. Cases, 227; 3 Viner's Ab., tit. Audita, G. H. 343; 6 Wend. 562; 10 Ala. 293; 13 ib. 214.

3. A petition and rule to show cause have been substituted for the writ of *audita querela* in modern practice. 4 Johns. Rep. 191; 5 Rand. 639; 2 Hill's S. C. Rep. 291.

4. The circumstances of the sale exhibit a case that entitles the party complaining to relief. It is a case of inadequacy of price and surprise.—Mobile Cotton Press Co. v. Moore, 9 Port. 679; Bixley v. Mead, 18 Wend. 611. It is a case of irregularity, of which the purchaser had notice. No advertisement was made of the sale under the execution in favor of the bank, and the sheriff did not declare at the sale that he sold under this execution. This execution was not subject to any of the objections that were opposed to the others. It was the duty of the sheriff to sell the property separately that was required to satisfy this execution.—Wood v. Morrell et al., 1 Johns. Ch. Rep. 502; Tiernan v. Wilson, 6 ib. 414; Rowly v. Webb, 1 Bin. 61; 3 U. S. Dig. 376, no. 432; 2 Ala. Rep. 256. The purchase was made by the attorney controlling the execution, and under circumstances of suppression—a suppression of truth and a want of good faith and ingenuousness. Courts regard such purchasers with suspicion and jealousy, and require of them *uberrima fides*.—Howell's Heirs v. McCreeny's Heirs, 7 Dana, 388; Howell v. Baker, 4 Johnson's Ch. Rep. 120; Drought v. Jones, Flona. & Kelly's Rep. 316; Alven v. Bond, ib. 196; Exparte James, 8 Vesey, 346.

5. A *bona fide* purchaser is not affected by the defects in the deed of trust. 7 Metcalf, 520; 4 Paige, 42; 2 Drury & Wor. 252; 1 Plowd. 61; 2 Ala. Rep. 349.

Hopkins & Jones, for defendant:

Lee, the plaintiff in error, is a stranger to the judgment and execution. He has no right therefore to be heard upon a motion to set aside the sale. Fournier v. Curry, 4 Ala. 321; ib. 406; 9 ib. 448; ib. 959; Cawthorne v. Knight, 11 ib. 268–9; 10 ib. 293–6; 15 ib. 212–15; ib. 429; 8 Johns. 257, 261; 17 ib. 487; 2 ib. Cases, 258; 4 Cow. 740.

If the plaintiff in error has the legal title, as he alleges, to the land, he has a legal remedy by action, and the court should not determine the sale to be void in this summary mode and establish the title of the plaintiff in error. 8 Johns. Rep. 257; ib. 260; 19 ib. 197.

If Lee had the right to make the motion, he had no right to do so until after the execution had been returned. Lee has prevented the return of the execution by causing it to be filed in another proceeding in the circuit court of Perry county.

The land was sold under several executions. It was necessary to sell the whole tract for their satisfaction, and the proceeds of the whole were greatly below the aggregate amount of the executions. It was proper to make the sale under all the executions. Wood v. Morell, 1 Johns. Ch. Rep. 507; Lock, et al. v. Coleman, 4 Monroe, 316. It is proved by the affidavits in the case, that the land sold altogether would bring a higher price than if it were sold in subdivisions.

There is nothing therefore in the objection that the whole tract was sold together and not in different parcels: The sheriff was not bound to sell in distinct parcels, as he was not requested so to sell by Lee or any one interested, and if he had been requested he would not have been bound to sell in different parcels, unless the request had been accompanied by a map or other description of the different parcels, so that each could be identified. 1. Johns. Ch. Rep. 505, 506.

Even in New York, where the statute law requires that no more real estate shall be offered for sale than shall appear necessary to satisfy an execution, the statute is directory merely to the sheriff, and the sale to a *bona fide* purchaser of more land will be valid. Groff v. Jones, 6 Wend. Rep. 523.

Davis, the purchaser, is a *bona fide* one; he did all he could to cause the land to bring its value, while Lee, and others acting with him, did what tended to cause it to sell for a mere nominal price. Inadequacy of price is not sufficient to set aside the sale, as it was caused by the acts of Lee and his attorneys and friends. Little's Sel. Cas. 256; Stockton v. Owings, 6 Watts, 140.

A bill of exceptions only could make the affidavits a part of the record of the case. At common law, there was no mode in which such evidence could be made a part of the record,

and none therefore in which the error of a court, in determining the effect of such testimony, could be corrected by an appellate court. 5 Peters, 199; 2 Porters' Rep. 155, 156; Tuck v. Smith, 12 Ala. Rep. 59, 61; 7 Gill. & Johns. 494, 496, 507, 508; 19 Johns. Rep. 156; 15 Wend. 581, 585.

Davis was the plaintiff in the execution of King and wife, in virtue of their assignment of the judgment to him in trust for the church. He had therefore the right to bid for and purchase the land, as other plaintiffs have.—4 Cowen's Rep. 784. An attorney may purchase for himself with his client's assent. 4 Cowen, 734, 740. Such a purchase is valid if subsequently approved by a client or acquiesced in—Paley on Agency, 143, 144; Story on Agency, 248.

As the executions under which the sale was made issued from three different courts, neither of the courts has jurisdiction to set aside the sale. If either has, each has, and the petition states, and the answer admits the sale has been set aside upon the motion of Lee, by the Circuit Court of Perry, from which most of the executions issued. The sale is the source of Davis' title. If the act of the Circuit Court be legal, and should not because it cannot be reversed, Davis will be as effectually stripped of the title he acquired from the sheriff as he could be by a judgment of the County Court of Mobile, affirmed by this court, setting the sale aside a second time. 1 Johns. Cases 155. The petition therefore shows the sale has been set aside by as competent a court as that in which this motion was made.

The case in 1 Johns. Cases, 155, shows that the receipt of the amount of the judgment in favor of the Bank by the commissioner from Lee has no effect upon the title which Davis acquired from the sheriff.

The evidence of the beneficiaries, who are the grantors with warranty of Lee, is not competent.

COLLIER, C. J.—1. The judgment of the County Court recites that the petition, answers and affidavits of the respective parties were in file and submitted, and that upon an inspection and consideration of these, the rule to set aside the sale under the *fieri facias* in favor of the Branch Bank at Mobile was discharged. In analogy to summary proceedings

against sheriffs and other officers, and motions at the suit of a bank, we are inclined to think the recital is sufficient to authorise us to look into the entire transcript before us. If the affidavits were not made a part of the record, by being used in the court below, and its judgment rested on them, should they not have been there stricken from the files, and must not this court accord verity to the certificate of the clerk? Humphrey v. Thompson, 6 Ala. Rep. 649; Moore v. Briggs, 14 Ala. Rep. 700. The petition, answer of Davis, and affidavits to which he refers, are unquestionably matters of record, and these alone we think will well sustain the view we take of the case.

2. It is clear that the plaintiff in error and those who were interested in supporting his title, as well as their legal advisers, were not aware that the sale was made under the execution in favor of the Bank, or if it was, that the judgment on which that execution issued was rendered previous to the making of the deed of trust by Hopkins for the benefit of his creditors. Upon this assumption we will inquire whether the purchase by Davis should be set aside?

In the Mobile Cotton Press, &c. v. Moore & Magee, 9 Port. Rep. 679, a rule was addressed to the sheriff and the purchaser under a *fieri facias* requiring them to show cause why the sale should not be set aside. We said, "it is well settled at common law, that courts of judicature possess a controlling power over the acts of their officers, which it is their duty to exercise in advancement of justice. Thus, if a sheriff is guilty of an irregularity in his proceedings upon an execution to the prejudice of either party, or a third person, the court will either set aside or correct the act complained of." Under the influence of this principle, it has been held, that if any fraud has been practised on the purchaser, or there was a mistake in the description of land sold under a *fi. fa.*, application may be made to the court to which the writ was returnable, to set aside the sale.—Friedly v. Scheetz, 1 Serg. & R. Rep. 162. And in Jackson v. Roberts, 7 Wend. Rep. 88, the court say, "a party who may be injured by the mistakes of a sheriff can have relief by a summary application to the court under whose authority the officer acts, or through the medium of a court of equity; and it is much better that he should be confined to these modes of redress than to render all titles derived from

judicial sales doubtful, and subject to be defeated, by allowing the written instrument by which they are evidenced to be attacked collaterally by parol evidence." Inadequacy of price may not be sufficient cause for setting aside a sale of land under execution, but when coupled with other circumstances it has induced the courts to avoid the purchase.—Arnott v. Copper & Nichols, 1 Har. & Johns. Rep. 471; Nesbit v. Dallam, 7 G. & Johns. Rep. 512; Stockton v. Owings, Litt. Sel. Cases, 256; Hansford v. Barbour, 3 Marsh. Rep. 515; Hart v. Bleight, 3 Monroe's Rep. 273. See further as to frauds and irregularities, and the effect of them in inducing a court summarily to vacate a sale under execution. Carlile v. Carlile, 7 J. J. Marsh. Rep. 625; Bleight's heirs v. Tobin, 7 Monr. Rep. 617; Knight v. Applegate's heirs, 3 Monr. Rep. 388; Mills v. Rogers, 2 Litt. Rep. 217; Ryerson v. Nicholson, 2 Yeates' Rep. 516; Ontario Bank v. Lansing, 2 Wend. Rep. 260; Groff v. Jones, 6 Wend. 522; Saul v. Dawson, 3 Wils. Rep. 49; Hubbert v. McCollum, 6 Ala. Rep. 221. In the case cited from 9th Porter, we made these deductions from the authorities: "1. A party injured by an improper execution of a *fieri facias* may obtain redress on motion to the court from which the writ issued: 2. That a sale of land will be set aside where the sheriff is guilty of a mistake, irregularity or fraud, to the prejudice of either party, or a third person: 3. So the misrepresentation or fraud of a purchaser furnishes just ground for invalidating the sale." In Howell's heirs v. McCreeny's heirs, 7 Dana, 388, which was a suit in chancery, it was said that "a purchase by an attorney under his client's execution, over which he had control, predisposes a chancellor to look on the transaction with jealousy and scrutiny, and should never be sustained when it was for a grossly inadequate price, and exhibits a semblance of unfairness." In Hall v. Hallet, 1 Cox, 134, Lord Thurlow said, "no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure. And although we would not go so far as to inderdict all such purchases, we do not doubt the public policy and the analogies of the law require that they should be considered *per se*, as in the twilight between legal fraud and fairness, and should be deemed fraudulent or in trust for the debtor

upon slight additional facts." In the same case, it was held, that "an undefined interest in an entire tract, *said* to have been incumbered by conflicting claims *unexplained*, and curtailed by sales *unspecified* and *unknown*, was sold by the sheriff, and thus it was impossible to make a fair sale for a full price." "Under such circumstances, the sale as made should be deemed unreasonable and unfair." To the same effect is Howell v. Baker, 4 Johnson's Ch. Rep. 118. These cases it must be observed were suits in chancery, yet they serve to show that the law requires *uberrima fides* on the part of those who have any immediate and direct agency in the management of sales under judicial process. And according to our practice, we have seen that the court, to which such process is returnable, will administer justice to a party who is aggrieved by the mistake, irregularity, or fraud of the officer, upon broad and equitable principles of right. Our own decisions, as well as several of those cited, show that it was the duty of the sheriff to have disabused the plaintiff and his advisers, by stating that he was selling under the execution at the suit of the Bank, or under process issued on a judgment rendered previous to the date of the deed of trust by Hopkins. It is fair to presume that the execution was indorsed as usual and imparted such information, and the misapprehension of the plaintiff and others was abundantly obvious. The neglect of the sheriff in this respect, if not in itself a sufficient ground for setting aside the rule, when coupled with the inadequacy of price and the other circumstances, furnishes such evidence of mistake or omission of duty as requires it to be vacated.

3. The proceeding by petition and notice, as in the case at bar, is but a substitute for the *audita querela* of the common law, and in such case the law is well settled, that not only a party to the judgment and execution, but any one whose land has been sold to satisfy it, may invoke that remedy.—Waddington, et al. v. Vradenbergh, 2 Johns. Cases, 227; Wood v. Torrey, 6 Wend. Rep. 562. See also Lovejoy v. Webber, 10 Mass. Rep. 101. In respet to the cases cited from 6 Port. and 4 and 9 Ala., it may be enough to say without a special notice of them, they do not lay down a different doctrine, but are applicable to a state of facts and to a cause of proceeding altogether dissimilar. The ground upon which the courts

interfere summarily in cases of this kind, is to prevent an abuse of its process, but it will not under the pretence of effecting this object determine upon the validity of titles.—In Nuchols v. Mahone, 15, Ala. Rep. 212, it was held, the court will not interfere by motion and set aside a sale of land made under execution, merely because the title of the defendant in execution was invalid; the party interested must defend the possession in the ordinary mode when the purchaser asserts his right. The objection in that case was, that the *fieri facias* issued after the death of the plaintiff therein. We said, "this is a sufficient ground for quashing it at the instance of a party or privy; but if the plaintiff stands in a situation which entitles him to submit a motion for that purpose, the invalidity of the execution does not warrant the court in setting aside the sale against a *bona fide* purchaser without notice. Besides the latent defect in the *fi. fa.* cannot be regarded as an abuse of the authority of the sheriff, or in any manner enter into its execution, where the officer has merely followed its mandate. If the land, which was sold, was really the property of the plaintiff in the motion, he may make his title appear, and defend his possession when the purchaser asserts his right; but we have seen the conflicting title will not be determined upon the application to set aside the sale. See Chambers v. Stone & Pope, 9 Ala. Rep. 260; Stewart v. Nuchols, 15 Ala. Rep. 225. It was supposed by the counsel for the defendants in error, that Nuchols v. Mahone was conclusive to show that the motion of the plaintiff should not be granted, but he should litigate his title when sued by the purchaser at the sheriff's sale to recover the possession. This argument cannot be supported. The cases are altogether dissimilar—in the former it was conceded that there was no abuse of the process, or irregularity on the part of the sheriff in its execution, but the defect being in the process itself, to be shown by extrinsic proof, and such as rendered it void *ab initio*, the party injured could vindicate his possession on a trial before a jury. In the present case, the objection is alone to the execution of the process, and the irregularity is such as cannot avail on the trial of an ejectment or trespass to try title; consequently, according to previous decisions of this court, it is competent to set aside the sale on motion.

4. The decision of the Circuit Court of Perry upon the facts presented in the record before us was *coram non judice*, and consequently the question here raised is not *res adjudicata*. Nor can the fact, that the execution was not returned, interpose an obstacle to the exercise of jurisdiction by the County Court of Mobile. It was not essential to the title of the purchaser that the execution should have been returned according to its mandate. The rights of the plaintiff would be affected quite as injuriously, whether it was retained by the sheriff or deposited elsewhere. If application was made to the Circuit Court of Perry, it would be not only competent, but proper for that court to direct its transmission to the proper depository. As there was no controversy in respect to the execution, and the fact of the sale, it was clearly allowable for the County Court to have adjudicated the question submitted for its decision, although the execution was not produced; and we cannot perceive why the institution of the irregular proceeding at the instance of the plaintiff in the Circuit Court of Perry should place him in a position more unfavorable to relief. The validity of the deed of Hopkins, in the aspect in which the point is attempted to be raised, cannot impair the title of the plaintiff to the land in question. If the vendors of the plaintiff acquired the land by purchase under executions against Hopkins, then the deed must be placed out of view; or if they purchased at a sale made by the trustee before the deed was declared void for fraud, in the absence of *mala fides*, if the trustee pursued the authority given him, they would hold the land against all persons who did not claim under pre-existing liens.

We waive the consideration of the question, whether it was irregular to have sold the land *en masse* instead of by its legal subdivisions. Several of the citations we have made lay down the law very explicitly on this point. In nothing that we have said, do we desire to be understood as attributing intentional unfairness or fraud to any of the parties to this proceeding. There is nothing in the record to require such an imputation; but it is upon the legal interpretation of acts and omissions that we think the sale should be set aside.

We have only to add that the judgment of the County Court is reversed, and the cause remanded.

PARKER *vs.* GOLDSMITH.

1. In an action of trover, the declaration of the defendant in reply to a demand of the property, that he holds it as the guardian of a third person and that the plaintiff has no right to it, is not competent evidence in his own favor.
2. The exception to the general rule, by which the declarations of the defendant in trover in reply to a demand of the property, when they amount to a reasonable excuse or qualification of his refusal to deliver it, are allowed to go to the jury, does not apply where the possession has been tortiously acquired.

Error to the Circuit Court of Chambers. Tried before the Hon. Geo. W. Stone.

Trover by defendant against the plaintiff in error for the conversion of a slave. Each party claimed title through John T. Goldsmith, deceased,—the plaintiff as guardian of George M. Goldsmith, her son by said deceased, and the defendant as guardian of John T. Goldsmith, a son of the deceased by a former marriage. In support of her title, the plaintiff proved the contents of a deed of gift executed by the deceased to her ward in December 1845, which the deceased delivered to his brother, but which he afterwards received from him and destroyed. It was a question in the court below whether this instrument was absolute or testamentary in its character. The defendant proved a subsequent parol gift of the same slave to his ward. The plaintiff having shown that the slave was in her possession, that the defendant had taken him out of her possession tortiously, and that she at the time forbade it and demanded the slave of him, the defendant offered to give in evidence his declarations in answer to the demand, viz, that he held the slave as the guardian of John T. Goldsmith, and that plaintiff had no right to him, but the court rejected it. The defendant then offered to read in evidence the last will and testament of John T. Goldsmith, deceased, but the slave in controversy not being named in it, and the defendant's counsel not pointing out its relevancy, the court excluded it from the jury.

To the rulings of the court the defendant excepted, and now assigns them as error.

ALLISON, for plaintiff in error:

1. The declaration made by the plaintiff in error, at the time the possession of the slave was demanded, was admissible as evidence for the purpose offered. Spence v. McMillan, 10 Ala. Rep. 583; Abney v. Kingsland & Co., 10 ib. 355; Roberts v. Trawick, 13 ib. 68; Goodgame v. Cole & Co., 12 ib. 77; Gray v. Ferrell, 9 ib. 206; ib. 869; ib. 382; Brown v. Brown, 5 ib. 508; 7 Port. 464; 5 St. & Port. 383.

2. The will was admissible as evidence, for the purpose of showing whether the deed or paper conveyance of the slave, made in 1845, was intended by the grantor as a gift *in presenti*, or as a testamentary paper.

BAUGH, for defendant:

1. If it appear from the evidence that the defendant wrongfully took the plaintiff's goods, it is an actual conversion, and no request to re-deliver them need be proved. 4 Phillips on Evidence, 224.

2. If the party of whom goods are demanded refuse to deliver them, and such refusal is reasonable, as where the party making the refusal is ignorant who is the real owner of the property, and requires to be satisfied respecting the ownership, then this would not be a conversion.—4 Phil. Ev. 226. But the case at bar is different. Here the party went to plaintiff's house and took possession of the negro when forbidden, and refused to restore it when demanded.—5 Stew. & Port. 391; 7 Port. 466.

CHILTON, J.—The main question presented by this record is, whether the defendant in an action of trover is entitled to give in evidence his own declarations, made at the time a demand is made of him for the property, which declarations respect the title to the property, but by which he does not propose to show any qualified refusal to surrender it, or any excuse for not doing so. The general rule is, that an admission or declaration is not admissible in favor of the party making it.—7 Cow. Rep. 459; 2 Phil. Ev. 154, n. 165. This rule has several exceptions, growing out of the nature of the declara-

tions to be proved, and their connection and relation to some act, as constituting part of it. The cases to which the counsel for the plaintiff in error has cited the court are illustrations of some of these; but the case at bar does not come within any established exception to the general rule, and in my opinion it would be *opposed* to the well settled rules of law to allow a party who has wrongfully possessed himself of the property of another, when the controversy has been stirred and restitution of it demanded, to create by his mere declarations testimony for himself. The law wisely forbids that a man should give testimony in his own cause, except in a few cases where the Legislature has deemed necessity required a departure from the rule. Much less then ought his declarations, made when not under oath, but under temptation to pervert the truth, be received.

The true rule applicable to cases like that before us, we think is laid down in Dent et al. v. Chiles, 5 Stew. & Por. Rep. 383–392, where it was held that if the declarations of the defendant in reply to the demand amounted to a reasonable excuse or qualification of his refusal to deliver up the property, then they were competent to go to the jury, as showing that there was in fact no conversion; and it was further added that it was incumbent on the party who offered the declarations to show what they were, that the court might determine from their character whether they came within the exception. The same rule was afterwards affirmed by this court in St. John v. O'Connell, 7 Port. Rep. 466–474, and Brown v. Brown, 5 Ala. Rep. 508–511. It is obvious, however, that this exception to the rule can only apply to cases where the defendant has obtained the possession rightfully, and not where he has tortiously obtained the property in violation of the rights of the true owner: for in such case a demand is wholly unnecessary, as the tortious taking includes a conversion.—Glaze v. McMillion, 7 Port. Rep. 279–281; St. John v. O'Connell, ib. 466–479.

Applying the principles settled by the foregoing decisions of this court, it is very clear that the Circuit Court did not err in excluding the proof offered of the declarations of the plaintiff in error. The record informs us, the declarations were, that the defendant claimed to hold the slave as the guardian of John T. Goldsmith, and that he declared the plaintiff had no

right to him. Such statements were clearly illegitimate for any purpose whatever, when offered by the party making them.

The will of John T. Goldsmith was properly rejected. The slave was not named in it, and neither party claimed any title under it. No legitimate presumption could therefore have been drawn from it in aid of the defendant below. If the slave vested in the plaintiff by virtue of the deed, the subsequent acts or admissions of the grantor could not divest it, and as there was no connection whatever between the will and the deed under which the plaintiff claimed, we cannot conceive how it could have aided the court and jury in arriving at the proper construction of the deed.

Let the judgment be affirmed.

PARKS *vs.* BROOKS.

1. A wife has an inchoate right to dower in land, purchased by her husband from an Indian reservee under the Creek Treaty of 1832, so soon as the contract is approved by the President of the United States.
2. An inchoate right to dower is such an incumbrance on land as will authorise a purchaser, who has contracted for a good and lawful title, to refuse to perform the contract.
3. Where a vendee retains possession of the land, a Court of Equity will not rescind the contract, unless there be some special ground for its interposition—such as the vendor's inability to make title, coupled with his insolvency, or fraud in the sale.
4. A Court of Equity will not rescind a contract, where the vendor, although unable to make title, is perfectly solvent, and has been guilty of no fraud, on the ground that he is a resident of another State, when it is shown that he was such at the time of the contract, and has so continued ever since.

Error to the Chancery Court of Macon. Tried before the Hon. Wilie W. Mason, chancellor.

This was a bill filed on the 6th of March 1846, by defendant against the plaintiff in error, for the rescision of a contract for the purchase of land. It alleges that on the 20th November 1841, the said defendant purchased from the plaintiff

the land described in the bill, at the price of three thousand dollars, for which he gave his three several promissory notes, payable the 25th December of the years 1842, 1843 and 1844 respectively, and received from plaintiff his bond, conditioned to make titles on the payment of the purchase money: that on the — day of —— 1842, he paid two hundred dollars, and on the — day of —— 1843, six hundred dollars more on the first note that fell due; that on the — day of —— 1845, he went to said plaintiff in person and offered to pay the entire balance of the purchase money, if said plaintiff could and would make him a good and lawful title to said land, and that said plaintiff then and there failed and refused to do so, and acknowledged that no patent had issued for said land, and that the only evidence of title he had was the bond for titles of one Alfred Hardy: that at the time of the purchase of said land, said plaintiff stated and represented and assured defendant that he could and would be able and ready to make him a good and lawful title to said land, according to the terms of his bond—that there would be no difficulty about the title—that defendant would be perfectly safe in making the purchase, and that the patent would issue and the title be perfected in him in a short time: that believing and confiding in these representations, he was induced to make the purchase: that said plaintiff has fraudulently conveyed away his property and placed himself in such a situation that nothing can be made out of him by the ordinary course of law, and that he has done this with the avowed intention of forcing out of him, defendant, the payment of the purchase money, of avoiding, by means of his fraudulent insolvency, the payment of such recovery as the said defendant might obtain against him by a suit in Georgia on said bond, and of keeping the title to said land at the same time beyond the defendant's reach: that said plaintiff resides in Georgia, and is insolvent and unable to respond in damages on said bond: that on the 9th day of August 1845, said plaintiff commenced his action in the Circuit Court of Macon county against the defendant on the said three several promissory notes, and is prosecuting the same to judgment: that soon after said purchase defendant went into possession of the land and made valuable improvements thereon: that he has held and still holds possession to indemnify him for the value

of the improvements he has made and for that portion of the purchase money he has paid: that the rents of said land are of inconsiderable value, and fall far short of indemnifying him, during the time he has had the possession thereof, for the improvements and purchase money paid: that he has been greatly injured by the refusal and inability of plaintiff to make a good and legal title, in this, that the land has diminished in value very considerably, and would not now, with the improvements, sell for as much as he, defendant, could have sold the land alone: that he has been prohibited from selling it for want of a title: and that he is ready and willing, and has been ever since said plaintiff failed and was unable to comply with his contract, and now offers to rescind it, &c. The bond for titles is made an exhibit to the bill, from which it appears that plaintiff was a citizen of Georgia at the time of the contract.

On the 18th April 1846, the plaintiff answered the bill. The answer admits the sale of the land, the terms, the execution of the notes and bonds, and the payment of a part of the purchase money as alleged in the bill. It also admits that defendant and plaintiff had an interview in the early part of 1845 in reference to the title to the land, that defendant then said he would like to pay the balance of the purchase money, but was not satisfied about the title, and that plaintiff told him the patent had not issued, and that he had no other evidence of title than the bond of Alfred Hardy, who held the approved contract for the land. It further states, that in that conversation, plaintiff told him that a patent would issue as soon the approved contract was presented at the proper department at Washington, and that he proposed to said defendant to postpone the matter until he could write to Hardy and ascertain from him whether there was any difficulty in procuring a complete title to the land, and that defendant assented to the proposition: that he did write to Hardy on the subject, and that Hardy, on the 14th June 1845, procured a patent to be issued to him, Hardy, cuted a warranty deed to defendant. The answer denies that deand on the 21st July thereafter, in conjunction with his wife, exefendant offered to pay the balance of the purchase money or any part thereof, or that he exhibited any money or demanded a title, or that plaintiff told him he could not make him a title,

but states that plaintiff asked him if he intended to pay any of the purchase money, and that he evaded an answer, by saying that the land had been certified and would be patented to Geo. Stone, who was insolvent, and that it would be subject to his debts. It admits that at the time of the purchase plaintiff represented to defendant that there would be no difficulty about the title, that it could be procured at any time with reasonable diligence, and that defendant may have been governed by these representations: asserts his readiness and willingness now and long before the filing of the bill to make to defendant a perfect title on the payment of the balance of the purchase money, his ability to respond in damages, and positively denies each and every allegation of fraud and insolvency. Exceptions were filed by defendant to the answer, some of which of a mere formal and technical character were sustained by the register, and on the 21st May 1846, the plaintiff answered over substantially as before. On the 19th May 1846, the defendant filed an amendment to his bill, in which he alleges that since the exhibition of his original bill he has procured from Washington a transcript of the Indian contract for said land and assignments thereon, from which it appears that it was approved to John W. Freeman by the President of the United States on the 1st November 1834, transfered by him by assignment, not under seal, to Jeremiah L. Walker, on the 17th March 1836, by Walker to John D. Chappell on the 5th April 1836, and by Chappell to said Hardy on the 14th November 1836. The said transcript is made an exhibit to the amended bill. It then alleges that Walker and Chappell were both married men whilst they owned the land; that their wives are still living; that Chappell is dead; and that said land is encumbered with the inchoate right of dower of Mrs. Walker and the vested dower right of Mrs. Chappell. It further alleges that defendant, relying on and confiding in the representations of plaintiff, purchased the land without seeing it, and that said plaintiff falsely and fraudulently represented to him that the land was all good except not more than forty acres of hog-bed land, when in truth and in fact about one-third or at least one hundred acres of it were worthless or nearly so, and unfit for cultivation.

The answer of plaintiff to the amended bill admits the cor-

rectness of the transcript made an exhibit and states that plaintiff knows nothing, nor is he informed as to whether said Walker was a married man or whether his wife is still living, but insists, that if the facts be so, she would not on the death of her husband be entitled to dower in said land. It further admits that Chappell was a married man, that he is dead leaving a widow who is still alive, but insists that she has never had any right of dower in said land, and if she had, her husband died testate, making provision for her in his will, and that she accepted the provisions thereof. The answer expressly denies that plaintiff falsely and fraudulently represented that all except forty acres of said land was good, and states that he made no representations, as to the character of the land, except upon the information of Hardy, and the source of his information was stated at the time.

Testimony was introduced at the hearing by both parties. The defendant's proof showed that Walker and Freeman were married men, at the time they respectively held said approved contract, and that their wives were still living; that Chappell was a married man while he held it, that he is dead, and his widow is alive: and that defendant had made some improvements on the land in clearing, fencing and erecting cabins, to the value of about two hundred dollars. The plaintiff introduced in evidence the patent for the land to said Hardy, dated 14th June 1845, a deed from Hardy and wife to plaintiff, dated 21st July 1845 and duly recorded, a deed from Rebecca Walker, widow of Jeremiah L. Walker, relinquishing her dower in said land, to said plaintiff, dated 13th Sept. 1846, and the admission of defendant that John D. Chappell died testate, making provision in his will for his widow, and that she accepted and was satisfied with the same. The plaintiff also proved that he lived in Georgia, at the time of said contract, that defendant wrote to him with a view to purchase said land, prior to the contract, and expressed himself satisfied when told that he had made a bad bargain; that the quantity of hogbed land on the tract did not lessen its value, and that it was worth at the time of the sale the price defendant was to give for it, as such lands then sold; that in May 1845, defendant and plaintiff had a conversation about said land, that defendant offered to pay plaintiff for the land if he could get a

good title, but did not produce or exhibit any money; that plaintiff offered to make him a warranty title, to which he objected because the patent had not issued, stating to plaintiff that according to the contract the land was to be patented, to which plaintiff replied that he had urged Hardy to get the patent, and it was through his negligence that it had not been done long ago; that defendant then said he was afraid it would issue in the name of Stone, who once owned the land and was now insolvent with unsatisfied executions against him, and that he might be involved in a law suit: that plaintiff told defendant he held the bond of Hardy; that Hardy held the approved contract, and that a patent could be obtained at any time the said approved contract was presented at the Land Office in Washington: that he would write to Hardy and have the patent issued, to which defendant then agreed. The plaintiff's proof further shows, that he is entirely solvent and able to respond in damages on the bond; that defendant has had possession of the land up to the present time; that there were one hundred acres cleared at the time of the purchase, and about forty more cleared in 1832, and that the annual rents have been worth from $1 50 to $2 50 per acre.

The chancellor on the final hearing decreed in favor of the defendant in error.

Cocke, for plaintiff:

1. The title of plaintiff is a complete legal title, free from incumbrance.—1st. The estate of Freeman, Walker and Chappell severally, under the approved contract and the assignments thereof, was equitable.—Chinnubbee v. Nicks, et al. 3 Port. 362; Jones, &c. v. Inge & Mardis' heirs, 5 Port. 327; Falkner v. Jones & Leith, 12 Ala. 165. 2d. In case of equitable title, if the husband disposes of his equity and then dies, the wife is not entitled to dower.—Herron v. Williamson, Little's Sel. Cas. 250; Lawson v. Morton, 6 Dana, 471; Edmondson v. Montague, 14 Ala. 370.

2. No false and fraudulent representations are shewn to have been made by plaintiff either as to the title or quality of the land.—1st. The representations made by plaintiff to defendant were matters of opinion or on hearsay and not false and fraudulent.—Spence v. Duren, et al. 3 Ala. 251; Steele v.

Kinkle, et al. ib. 352; Juzan, et al. v. Toulmin, 9 ib. 662. 2d. The defendant shews by his bill that he knew the situation of the title, and the testimony of Baldwin, the subscribing witness to the bond, strongly tends to prove that he had examined the land before the purchase was made; he consequently had an equal opportunity with plaintiff to be informed both as to the title and quality of the land, and could not have been deceived.—Craig v. Blow, 3 Stewart, 452. 3d. His long continued possession and acquiescence, under the circumstances, are a forfeiture of all claim to the active interference of a court of chancery. McGowan v. Garrard, et al. 2 Stew. 47; Griggs v. Woodruff, et al. 14 Ala. 9; Pintard v. Martin, 1 S. & M. Ch. 126; Edwards v. Roberts, 7 S. & M. 544.

3. As a general rule, where a vendee retains the possession of land, a court of chancery will not rescind the contract, unless there is some special ground for its interference—such as the vendor's inability to make title, coupled with insolvency, or fraud in the sale.—Duncan v. Jeter, 5 Ala. 604; Long and Long v. Brown, et al. 4 Ala. 622; Barnett v. Gaines, et al., 8 Ala. 373; Griggs v. Woodruff, et al., 14 Ala., *sup.* 1st. The answer of the vendor, denying expressly every allegation of insolvency or fraud, but expressing the opinion, that he could make such a title as his bond required, although that opinion is not sustained by the evidence, cannot of itself be regarded as sufficient to vary the general rule. 2d. Nor can the non-residence of the plaintiff, a fact that existed and was known to the defendant at the time of the purchase, have that effect.

McLester, for defendant:

1. At the time Brooks purchased the land, no patent had issued, and there was no evidence of title within his reach. But Parks represented his title good, and that there would be no difficulty about it, and Brooks relied on these representations, which he had a right to do.—Young v. Harris' adm'r, et al. 2 Ala. Rep. 108; 1 Story's Rep. 190; 3 ib. 700.

2. There is nothing in the will of said Chappell taking away the right of his wife to dower in said land—her assent to, and acceptance of the provision made in the will of her husband, does not under the statute take away her right to dower in land which constituted no part of the estate of her husband.

The object of the statutes, passed on the subject, was to prevent unequal and unjust distributions of property between mothers and children.

3. Mrs. Freeman's right to dower is clear; and it is believed that either of these rights of dower constitute a sufficient objection to the title the platntiff in error proposes to make. Barnett v. Gaines, et al. 8 Ala. Rep. 374.

4. The plaintiff in error resides in the State of Georgia, and without the interposition of a court of equity in his aid, Brooks would have been compelled to pay the money for said land, to have accepted a defective title, or have been driven to sue on the bond in the State of Georgia, to recover back the purchase money after having paid it. Will the courts of equity of Alabama suffer her citizens to be driven to foreign countries to recover their rights while they have ample powers to protect them? Will not the court interpose by injunction, especially in a case when the party who resides out of the State has been guilty of false representations as to his ability to perform his contract? See Stewart, et al. v. Chamberlain 6 Dana's Rep. 32; Merrill v. Fowler, ib. 305.

DARGAN, J.—In the case of Shields v. Lyon, Minor's Rep. 278, this court decided that the certificate of the board of commissioners, confirming a claim to land under a Spanish warrant of survey, is evidence of such an estate as entitles the widow to dower under our statutes; that it was such a title as gave the party to whom it was confirmed a perfect right to call on the government for a patent, and hence the widow was entitled to dower therein. This decission was made at an early day after the organization of our State government, and from that time until the present, it has been considered as settled law, that if the husband held such evidence of title as entitled him to demand and receive from the government of the United States a patent for the land, his widow was entitled to dower therein. See the cases collected in Edmondson v. Montague, 14 Ala. 370. Under the treaty of 24th March 1832 between the United States and the tribe of Creek Indians, an Indian reservee was authorised to sell the land reserved to him, and if the contract of sale was ratified, and approved of by the President, the purchaser became entitled to a patent.

Chinnubbee v Nicks, 3 Porter 362. In the case of Jones & Parsons v. The Heirs of Inge, et al. 5 Porter, 327, it is said, that an Indian reservee, when the land reserved to him had been selected and set apart by location, became entitled to the possession until he had disposed of it according to the terms of the treaty, or had abandoned it; that this right of possession gave him a legal title, which a court of law would protect and enforce, and that his purchaser or grantee, as soon as the contract of purchase became valid, by the approval of the President, became entitled to all the estate vested in the Indian by the treaty. A purchaser from an Indian reservee, after his purchase has received the sanction of the President, becomes entitled to a patent from the Federal Government without having to perform any condition precedent to his right to demand it. If we were therefore to admit, that the contract of purchase was not the highest evidence of legal title or seizin, but that the patent, issued in pursuance of that contract, bore that evidence, yet as the contract, by the terms of the treaty, gave a perfect right to the *patent*, the wife of the purchaser becomes entitled to dower, after the contract of purchase made with the Indian reservee has been ratified by the President, and the issuance of the patent to her husband is not necessary to complete her right to dower, as against the heir of her husband or his assignee. Having attained this conclusion, it follows that Mrs. Freeman, the wife of John W. Freeman, who purchased from the Indian reservee, has an inchoate right to dower in the lands, which will become perfect on the contingency of her surviving him. The contract made by Freeman was ratified by the President. After this was done he transfered the contract, but Mrs. Freeman did not release her dower. The land is therefore still charged with the burthen of her dower.

2. The bond of the defendant stipulates for a good and lawful title, and the question is, can a purchaser, who contracts for a good title, and who relied on the representations of the vendor, that he could make such, be compelled to receive a title which is charged with an inchoate right of dower in favor of the wife of a remote vendor? To justify a court of equity in compelling a purchaser to receive a title, when he contracts for a good one, relying on the ability of his vendor

to make such, the title of the vendor should be unquestionably good, and it is said, "like Cæsar's wife, ought even to be free from suspicon."—1 Sugden on Vendors, 340. A court of equity will never compel a purchaser to take a title, unless it could say, you can never be ousted, holding the title the vendor proposes to give you. If, however the title proposed is liable to be defeated in the whole or part, upon the contingency of the survivorship of a wife of a remote vendor, or on any other contingency within the range of probability, the court should not decree a specific performance. In the case of Porter v. Noyes, 2 Greenl. Rep. 22, the contract was that the vendor should make a warranty title, free and clear of all incumbrances, but at the time the deed was tendered, it appeared that one C. had an inchoate right of dower in the premises: The court considered this as an existing incumbrance that justified the vendee in refusing to perform the contract on his part. To the same effect is the case of Clarke v. Redman, 1 Blackf. 379.—See also Judson v. Wass, 11 Johns. 525.

3. The defendant has failed to show such a title as a court of equity will compel the complainant to accept, on account of the dower right of Mrs. Freeman, and of course the complainant may abandon the contract at any time previous to the removal of that objection to the defendant's title; but as yet, the contract is not rescinded, nor the possession abandoned. The complainant, however, offers by his bill to rescind the contract, and claims to hold on to the land as an indemnity for the portion of the purchase money he has paid, and the improvements made upon it. The question therefore arises whether the complainant has made out such a case as requires a court of equity actively to interfere in his behalf, and to rescind the contract for him, whilst he holds on to all the benefits confered by the contract, to wit, the possession and use of the land. There is a marked distinction between rescinding a contract, and refusing to enforce one, and it is well settled, that a court of equity may refuse to rescind a contract, when it would not specifically enforce it. Beck v. Simmons and Kornegay, 7 Ala. 71; Seymore v. Delancy, 3 Cowen, 530; Jackson v. Ashton, 11 Peters, 248. I have not been able to find a case where a court of equity has rescinded a contract of a sale of land, at the instance of the purchaser, while he

holds on to the possession, unless the contract has been tainted with fraud, or unless injury would result to the purchaser from giving up the possession. In the case of Young v. Harris, 2 Ala. 108, this court decreed the rescission of a contract at the suit of the vendee, who had taken and retained the possession, and also charged the land with the portion of the purchase money, that had been paid, but the complainant made out a clear case of *fraud.* The authorities all agree, that if a purchaser has been induced by fraudulent means to enter into a contract, and expends money, or pays it as purchase money, he may apply to a court of equity for a rescission and relief, without yielding up the possession.—Edwards v. McLeary, 1 Cooper's Sel. Cases, 308; 2 Swanston, 303. But in the case of Duncan v. Jeter, 5 Ala. 604, it was said in reference to the abandonment of possession, that circumstances may exist which will authorise a vendee to retain it whilst he seeks a rescission of the contract, as where the vendor was insolvent, and was unable, or unwilling to make title; in such a case the possession may be retained as the only means of reimbursement; and in the case of Long, et al. v. Brown, 4 Ala. 622, this court held, that equity ought not to interfere between the parties although the contract be executory, where no fraud has been practiced, but will leave them to seek the redress the law will afford, unless there be some special ground for the interposition of the court of equity. Governed by these authorities, as the complainant yet retains the possession of the land, and derives all the benefits contemplated by the contract, he must show some other reason for the interference of the court in his behalf, than the mere dry legal right he has by the terms of the contract, to abandon it on his part. In addition to showing that the contract could not be specifically enforced, he must either show fraud, or that injury would result to him from the insolvency of the vendor. If neither of these circumstances be shown, we must leave him to exercise his legal rights as he may see fit. The bill, answer and proofs, in our opinion, entirely fail to show either fraud or insolvency on the part of the vendor, and we therefore must decline to interfere for the purpose of rescinding the contract.

It is, however, contended, that as the vendor resides in Georgia, that this is a sufficient reason to justify the court in re-

sciading the contract. In this we cannot agree with the defendant's counsel. The vendor resided in Georgia at the time of the purchase, and this was known to the complainant—he still resides there, and is shown to be solvent; he has not been guilty of any fraud, and the only defect in his title, is an inchoate right to dower in the wife of a remote vendor, whose husband is still living. Under such circumstances, a court of equity should not be active in rescinding the contract, but should leave the complainant to the exercise of his legal rights. We have not noticed the question of dower in the wives of the other vendors, through whom the defendant claims title, because two of them have released their right of dower, if any they ever had, and we think Mrs. Chappell is barred of her right by the provisions of her husband's will, as it is shown that she has not dissented from it, but has received the lands and other property devised to her. It is true, that it is frequently a difficult question to determine when a widow shall be put to her election between her right of dower and the provision made for her by the will of her husband, but I think she would be when her claim to dower would disturb the devise, or be inconsistent with her own title as devisee, as well as the title of other devisees. For instance, if the land be devised to be equally divided between the wife and children, she cannot hold her share as devisee and also from the same land claim dower, but she is put to her election, either to take as doweress or as devisee. This is the character of the will of Chappell, and although it is not expressed in *totidem verbis*, that the provision for his wife was intended in lieu of dower, yet he could not have intended that she should claim her dower out of the lands he devised and also claim her portion as devisee.

This concludes our examination of all the questions presented by the briefs and argument of counsel, and the result of our opinion is, that the chancellor erred in decreeing a rescission of the contract. He should have declined to interfere. We must therefore reverse his decree, and render a decree dismissing the bill.

Chilton, J., not sitting.

GREENE *vs.* TIMS, USE, &c.

1. The sureties in a bond for the forthcoming of a slave seized by virtue of an attachment, and which slave is afterwards levied upon under an execution issued on the judgment rendered in the same suit, and claimed by a third person, are competent witnesses for the plaintiff in the trial of the right of property.
2. The promise of a plaintiff in attachment to waive his lien on the property attached in favor of certain persons cannot, on the trial of the right to the property, be taken advantage of by one who has no connection with the parties to the arrangement, and whose interest cannot have been prejudiced thereby.
3. The sheriff levied an attachment on a slave, and, taking merely a delivery bond for its forthcoming to answer and satisfy the judgment, restored the slave to the possession of the defendant, and made return on the writ, that a claim had been interposed and bond executed for the trial of the right of property: The plaintiff in attachment thereupon proceeded to prosecute the claim suit, which, before its final disposition, was continued six times by general order of the court and five times by consent of the parties: During its pendency, the plaintiff aided the claimant in procuring security on a claim bond, given by him for other slaves levied upon under an execution in favor of another creditor of the defendant in attachment, and induced certain persons to become his sureties by promising to release his lien on the slave attached:—*Held*—1st. That, however strongly the facts may tend to show an intent to hinder or delay other execution creditors of the defendant in attachment, it cannot be assumed as a conclusion of law that the lien of the attachment was lost. 2d. That if such conclusion could be indulged, an after claimant of the slave, who neither shows himself to have been an execution creditor, nor to have derived title under one, cannot be benefitted thereby.
4. Every legal intendment is made in favor of the affirmance of judgments, and where a charge of the court as applicable to the facts of the case may or may not be correct, it is incumbent on the party complaining to set out in the record so much of the evidence as is necessary to show its error.
5. The expression of an opinion by the court, during the progress of a cause, which does not appear to have been given as a charge to the jury, or intended for their hearing, although erroneous, cannot constitute a ground of reversal.

Error to the Circuit Court of Marengo. Tried before the Hon. Samuel Chapman.

This was a trial of the right of property in a slave by the name of Captain, levied on under an execution in favor of the defendant in error for the use of Goodwin & Walthall against Thomas Batte, sr., and claimed by the plaintiff in error. The following facts are to be gleaned from the record: On the 2d February 1841, the defendant in error sued out an attachment against Thomas Batte, sr., which was levied on the slave in controversy, and a forthcoming bond executed by Thomas Batte, jr., with James Sheppard and William P. Lancaster as securities, whereupon the sheriff restored the slave to the defendant in the attachment. At the time of the levy, Thomas Batte jr. made affidavit that the slave was his property, but he does not appear to have executed a claim-bond—the only bond given by him being the forthcoming bond above mentioned, and upon the execution of which the sheriff endorsed the attachment with his levy and the interposition of a claim by Thomas Batte jr. The claim suit between the defendant in error and Thomas Batte jr. was regularly continued till the fall term 1846, when a trial of the right of property was had, and the slave found subject to the attachment. During the pendency of this suit, judgment was rendered on the attachment against Thomas Batte sr., and an execution, issued on this judgment, was levied on the said slave Captain on the same day and immediately after his condemnation, whereupon a claim was interposed to him by the plaintiff in error. On the trial of this claim, the plaintiff in execution introduced the said Sheppard and Lancaster as witnesses. The claimant objected to their competency, on the ground of their liability on the forthcoming bond, but the court overruled the objection and permitted them to testify. Pending the trial, the claimant's counsel insisted that the lien of the plaintiff in execution was lost in consequence of no claim-bond having been given by Thomas Batte jr., the return of the property to the possession of Thomas Batte, sr., and the continuance of the claim of Thomas Batte jr. from 1841 to 1846, without execution being issued on the judgment; but the court ruled that the lien was not lost, and that the judgment of condemnation was conclusive against all persons who claimed under Thomas Batte sr. or by purchase by virtue of any execution against him. The claimant proved by Lancaster and one Burwell, that Goodwin,

one of the beneficial plaintiffs in this case, induced them to sign a claim-bond for other slaves, which had been levied on under an execution in favor of one Fareinholdt against Thomas Batte sr., and were claimed by Thomas Batte jr., and told them that if they would do so, he would release his claim on the slave Captain.

The court charged the jury that if they believed from the evidence that the boy Captain was the same boy that had been attached and condemned in the trial in which Thomas Batte jr. was claimant, then they should find for the plaintiff in execution.

To the rulings of the court, and to the charge given, the claimant excepted, and now assigns them as error.

Brooks & Byrd, for plaintiff in error:

1. Sheppard and Lancaster were clearly incompetent; they were directly interested in the suit; they were sureties in a bond given by them and young Batte, conditioned to return said slave to answer the judgment which might be recovered in the attachment suit. If said slave was condemned in this suit, he would be subjected to the payment of said judgment, the conditions of the bond would thereby be fulfilled, and the obligors exonerated. Whether the bond was a replevy bond or bond for the trial of the right of property, they were the sureties therein, and if there was no forfeiture, they by their testimony were preventing the said bonds from being forfeited. The replevy bond bears the same date of the sheriff's return.

2. The lien of the attachment was waived, as is shown by the testimony of Lancaster and Burwell.

3. Upon the levy of the attachment a bond was given, not by the defendant in the attachment, but by Thomas Batte jr., a stranger to it; and upon the execution thereof, the slave was returned to the possession of the defendant. This bond was unauthorised by the statute, and could not operate to continue the lien. Clay's Dig. 61, § 33; Rives & Owen v. Willborn, 6 Ala. 45.

4. Judgment in the attachment suit was rendered in 1843, and nothing intervened to prevent the plaintiff from selling the slave under execution, and yet three years elapsed without any proceeding. The lien was thereby lost. Patton v. Hayter, Johnson & Co., 15 Ala. 18.

5. The charge of the court was erroneous. By it the jury were directed to find in favor of the plaintiff in execution, if they should believe that the boy Captain was the same boy that had been attached and condemned in the trial of the right of property between the said plaintiff and the younger Batte. No other question was submitted to their determination. The boy might have been the same, and yet not liable to the execution. The court refused to allow the jury to decide the various questions growing out of the facts of the case.

VARY, for defendant.

CHILTON, J.—1. We cannot conceive what interest the witnesses, Lancaster and Sheppard, had in this controversy. They had, it is true, entered into an informal delivery bond payable to the sheriff, conditioned to have the slave forthcoming to answer and satisfy the judgment of the plaintiff in attachment; but allowing that the bond was good as a common law obligation, it is very certain that the condition was fully complied with, when the property was forthcoming to to be levied upon by the execution, issued on the judgment. The execution has been levied, and the sureties put in no default, so that they must be considered as completely discharged from all liability under it, if any ever attached. They were therefore clearly competent witnesses, and this assignment of error cannot prevail.

2. As to the supposed waiver of the lien upon the slave in controversy, as shown by the proof of Lancaster and Burwell, we think the court very correctly instructed the jury that the claimant could not avail himself of it. He was a stranger to the agreement—was not induced to act upon it so as injuriously to affect his interest, and as he was in no way connected with it, or affected by it, he should not take advantage of it. It was an arrangement between Burwell and Lancaster and Goodwin to induce the two former to go on a claim-bond for the younger Batte, and if *they* do not insist upon the agreement, it is clear that Greene, the claimant, cannot.

3. But it is said that the plaintiff in the attachment lost his lien by the manner in which he has prosecuted his claim upon the property: 1st—Because he proceeded when no claim-bond

was given; 2d—That the slave was permitted to go back into the possession of the defendant in the attachment; 3d—That the case was retained many years on the docket, having been continued six times by the general order of court, and five times by the *consent of the parties;* 4th—That Goodwin was aiding in the meantime the younger Batte, who was then claiming this slave as exempt from the attachment, in obtaining security upon a claim-bond, so as to prevent other creditors of the elder Batte from selling his slaves, and promising even to release his lien on the slave so as to procure sureties for him. It cannot be assumed as a conclusion of law from any or all of these facts, that the lien was lost. They would, however, have been proper for the consideration of the jury, in determining the question (had the claimant shown his right to raise it, of which we will hereafter speak,) whether the plaintiff in the attachment was prosecuting his claim to a condemnation of the slave to the satisfaction of his demand in *good faith*, or, on the other hand, whether the levy and subsequent proceedings were not designed as a mere blind to keep off other creditors from proceeding against the property; for as fraud vitiates the most solemn judgments of courts of justice, it is very clear that if such litigation was conceived and carried on for the covinous purpose last above refered to, the proceedings under the attachment and judgment of condemnation could not be successfully urged against a *bona fide* creditor, who, in the meantime, had levied upon and sold the slave, nor against a purchaser who could claim the protection of such judgment and sale. It was the duty of the sheriff to have taken a claim-bond before parting with the possession of the property. His *return* upon the attachment, on which the plaintiff had the right to rely, asserts that he did take such a bond, and the claim was thereupon prosecuted, as we have before stated. Now the plaintiff in the attachment, if there was no fraud or collusion between him and the claimant, should not be stripped of his lien by the unauthorised act of the sheriff, to which he never consented, so far as the proof discloses.—4 Ala. Rep. 357; 14 ib. 232.—In Patton v. Hayter, Johnson & Co., 15 Ala. Rep. 18, the plaintiff actively interfered and ordered the delay, and thus lost his lien. But if we concede that the plaintiff in the attachment,

by reason of the manner in which the claim was interposed and prosecuted, and the return of the property to the defendant in the attachment, lost the lien as against other *bona fide* creditors of the elder Batte, who had caused their executions to be levied, how is the plaintiff in error to be benefitted by the concession? His counsel inform us that he bought the slave under a sale made upon a *fi. fa.* issued on a judgment against Batte sr. in favor of Fareinholdt, and that the slave was levied upon and sold while in possession of the Elder Batte, and pending the trial of the right of property between Tims, use, &c., against Batte jr. However correct all this may be, the record, by which alone we must be governed, says nothing about the manner in which Greene purchased or claimed title to the slave, or of any levy upon him by any creditor, save the defendant in error.

4. The charge of the court to the jury was, "that if they believed from the evidence that the boy Captain was the same boy that had been attached and condemned in the trial in which Thomas Batte jr. was claimant, then they should find for the plaintiff in execution." Now had the claimant shown that he was a *bona fide* purchaser under a sale made by execution upon the judgment of another creditor, as his counsel insist, then we are clearly of the opinion that this charge, which in effect forestalled the inquiries of the jury as to the *bona fides* of the proceeding, which resulted in a condemnation of the property, and consequent preservation of the lien, would have been erroneous. The claimant then should have shown his right to have contested with the defendant in error the effect of the judicial proceedings upon which the plaintiff in execution relied, and in respect to which the court gave the charge complained of. It is manifest, the charge may or may not have been correct, as the facts may have justified or forbade it; and in such case, it is incumbent on the party who complains of the charge to show that as applicable to the case made by the facts, he has been illegally and injuriously affected by it. Taking the proof, which is set out in the bill of exceptions, as being all that was offered, and the charge is certainly correct; for the proof leaves the claimant without shadow of title, and does not even show that he had possession of the slave. On the other hand, the plaintiff shows the levy of the

attachment upon him in the possession and as the property of the elder Batte, his condemnation on the trial of the right of property to satisfy the attachment, and a subsequent levy of the execution issued upon the judgment obtained on the attachment. The doctrine of legal intendments and presumptions forbids us to presume that there was other evidence which would have rendered the charge erroneous—the maxim being *omnia præsumuntur rite et solemniter esse acta.* In Peden v. Moore, 1 S. & P. 71, cited by the plaintiff's counsel, the court charged the jury, "that unless a total failure of consideration was proved they should find for the plaintiff," thus asserting the erroneous legal proposition that the defendant could not avail himself of a partial failure of consideration. The Supreme Court refused to consider the charge as abstract, but reversed the cause upon the presumption that there was evidence as a predicate for the charge. The same may be said of the decision in Rowland v. Ladiga, 9 Porter, 488. In that case the Circuit Court in its charge embodied the facts upon which it was predicated, and on which the erroneous charge was founded. In Dukes v. Lowrie, 13 Ala. Rep. 459, the charge as an abstract proposition of law, was incorrect, and we presumed it was not abstract. In the case before us it is very different. Here, the charge, as we have before stated, must be refered to the evidence to determine whether it is legal or otherwise, and thus considered, it is free from objection.

5. Pending the examination of the witnesses, the bill of exceptions recites that the counsel insisted the defendant in error had lost his lien, for the reasons above refered to, and the court ruled that the judgment of condemnation was conclusive as against a purchaser from the elder Batte, or under execution against him pending the trial, &c. This was the mere expression of an opinion by the court in the progress of the cause—was not given as a charge to the jury, nor does it appear that the opinion was intended for their hearing. We cannot look to it as a ground for reversal, but must regard it as a mere expression of an abstract opinion in response to the suggestion of counsel. Had the opinion thus expressed been given in charge to the jury, it would, for the reasons we have previously stated, have constituted a ground for reversal.

We are unable to discover any error in the record, and the judgment of the Circuit Court must be affirmed.

DARGAN, J.—I dissent from the conclusion attained by the court. The charge given by the Circuit Court, I think, is erroneous. It reduced the inquiry of the jury to the simple question whether the boy Captain was the same that had been attached and condemned in the trial of the claim of Thomas Batte, jr. Thus a conclusive effect was given to those proceedings against the claimant, although he was not a party to them, nor bound by them in any manner, so far as the record in this cause discloses. For this error, I think the judgment should be reversed.

LEDYARD & HITCHCOCK *vs.* JOHNSTON ET ALS.

1. A creditor of an estate must exhaust all his legal remedies against the personal representative and his sureties, if solvent, before he can resort to a Court of Equity to subject the effects, which have passed into the hands of the distributees, to the payment of his demand.
2. Where the creditor has failed to exhaust his legal remedies against the personal representatives and his sureties, the circumstance that he filed his claim with the Judge of the Orphans' Court, who promised to give him notice of any objection that might be made to it and to defer the final settlement of the estate until he could have an opportunity to establish it, but who neglected to do either, cannot aid the jurisdiction of equity to subject the effects which have passed into the hands of the distributees.

Error to the Chancery Court of Clarke. Before the Hon. Jos. W. Lesesne, Chancellor.

The bill, which was filed by the plaintiffs against the defendants in error as legatees of Joseph Johnston, alleges that at the time of the testator's death, he was indebted to them in the sum of $195, and that after his death his executors contracted a debt with them for the benefit of the estate to the amount of $229, both of which demands were presented to

the said executors within eighteen months after grant of letters testamentary, and acknowledged by them to be just: that one of the executors died insolvent in 1841, and the other resigned his trust, and an administrator *de bonis non, cum testamento annexo*, was appointed and took possession of unadministered effects of the estate to the amount of $20,000: that the claims of complainants were presented to said administrator also, and that he promised to enquire into their justice, and pay them if he found them to be correct: and that the claims were then filed, properly authenticated, with the Judge of the Orphans' Court of Clarke county, who promised complainants' counsel, that if upon final settlement of the estate objection should be made to them, he would continue the matter until the complainants had notice of the fact and were given an opportunity to establish them, but that said estate had been settled and distributed among the legatees by the said Judge, leaving the claims of complainants unprovided for and still unpaid. The bill prays for contribution from the legatees and general relief. The chancellor on the final hearing dismissed the bill, and to reverse his decree, this writ of error is sued out.

Blount, for plaintiffs in error:

1. Has confidence been reposed and the complainants misled to their prejudice and injury? In cases of this and a like nature, a court of equity will interfere.—1 Story's Eq. 133, note, 208, 211, 212, 254, and note. 1st. The Judge of the County Court undertook to give "*notice and a term, if objections were made*"—although "he was satisfied of the truth and accuracy of the claim," and that "it was duly authenticated." Objection having been made, did he give the term and notice? Conceding that it might have been done innocently, are the rights of complainants concluded by this final settlement? In the language of Judge Story, "it would be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice, under the shelter of a rule framed to promote it."—1 Story's Eq. 167, § 202; Chesterfield v. Jansen, 2 Vesey's Rep. 155, 6; 1st proposition of Lord Hardwicke. 2d. It seems a court of equity will relieve in a case

of mistake of law merely.—Hunt v. Ronsmanier, 8 Wheaton's Rep. 174; Fitzgerald v. Peck, 4 Lit. 127.

2. The complainants are without relief at law. The estate of Joseph Johnston has been settled, the administrator discharged, and the assets distributed. There is no legal representative of Joseph Johnston to *sue at law*. The complainants having no notice of final settlement, were without opportunity of introducing testimony, of taking exceptions on the record, and removing the same by writ of error to a higher court. This they were prevented from doing either by the fraud, accident, mistake or misrepresentation of the Judge who made the final settlement.

3. It is immaterial which of these grounds may have been the cause of injury to the complainants. The powers of the court of chancery are adequate to administer relief in either or all. Chancery will hold the defendants liable as trustees for the complainants to the amount of the debt due them, the property admitted to be received by them as legatees being the fund from which complainants should have been paid by decree of the Orphans' Court.—Thompson v. Brown, 4 Johns. Ch. Rep. 646; Coopwood v. Wallace, 12 Ala; Smith v. Caswell's repr. 2 Haywood's Rep. 285; Livingston v. Livingston, 3 Johns. Ch. Rep. 153; Riddle v. Mandeville, 5 Cranch. Rep. 322, 329, 230; 2 Story's equity 498, § 1251; 1 Story's Eq. 110 § 92 and note 1.

Taylor, for defendants.

COLLIER, C. J.—Where an administrator has wasted the estate of his intestate, *all legal remedies* should be exhausted against him and his sureties, if they or either of them are solvent, before a creditor will be permitted to come into a *court of equity* to subject the estate which had passed into the hands of the heirs and distributees.—Darrington, et al v. Borland, 3 Porter's Rep. 9; Pike v. Searcy, et al. 4 Porter's Rep. 52. These decisions rest upon the ground that the liability of the administrator is *primary*, and the sureties who stipulated for his faithfulness are chargeable with his default; that the liability of the heirs and distributees is secondary and contingent merely, depending upon the reception of part of the intestate's

estate by them, and the fact that the creditor has not lost his remedy against the administrator by neglect or other cause.

The cases cited are perhaps decisive of the present, and show that conceding to the bill all verity, the complainants are not entitled to the relief they seek. It is alleged that the complainant's claims were duly presented to the executor and executrix, who admitted that they were just and promised payment; that after their resignation, presentment was made to the administrator *de bonis non.* If these allegations be true, the plaintiffs may sue the administrator, *at law*, and it will be no answer to show the administration had been settled by the Orphans' Court and the assets distributed. It was the duty of the administrator, if the plaintiffs claims are just, to have paid them; if this had been done previous to the settlement of his accounts, he should have charged himself with a sufficient sum and retained it. Their due presentation makes the administrator liable, until payment or the statute of limitations bars a recovery.

The estate not being reported insolvent, in fact its solvency being distinctly alleged, the law did not require the claims to be filed in the Orphans' Court by the creditor; and the promise of the Judge of that court, to give him notice and time to meet any objections that might be made to them, can have no influence upon the bill as the case is now presented. Such an undertaking was rather *extra judicial,* than within the line of duty, and the failure to comply with it cannot assist the jurisdiction of equity, at least until it is shown that there is no *available remedy* against the administrator by suit at law.

Previous to the act of 1843, when an administrator proposed, or was required to settle his accounts, he produced his vouchers, most usually accompanied with an account current, to the Orphans' Court, where an account of his administration was stated, and notice given of the time when the same would be reported for allowance, that all persons interested might appear and contest it.—Legatees of Horn v. Grayson, 7 Port. Rep. 270; Douthitt's adm'r v. Douthitt, 1 Ala. Rep. 594; Taylor and wife v. Reese, 4 Ala. Rep. 121; Robinson and wife, et al. v. Steele, adm'r 5 Ala. Rep. 473. But since the passage of the act refered to, it is not necessary for the Judge of the Orphans' Court to state and audit the accounts previous to the

final settlement.—Steele v. Knox, 10 Ala. Rep. 608. It is, however, the duty of the administrator previous to settlement, to file an account between himself and the estate he represents, and at the time appointed in the order of publication "for said settlement to be made, or so soon thereafter as the same is regularly reached, the said Judge shall audit and examine said account and vouchers, and after hearing the exceptions and objections to the same, (if any are made,) and the evidence adduced, shall proceed to state the same, and render a decree thereon, which decree shall in all respects have the force and effect of a judgment at common law." Clay's Dig. 229, § 42. If the administrator takes no notice of a claim in his account, or no voucher in respect to it is filed by him, it is not for the Judge to make an addition to the account, unless he shall adjudge it to be proper after legal "exception and objection." But could a creditor object to the account, that a claim of which he had given notice to the administrator was not embraced, or should he not litigate it in another *forum* by a suit for its recovery? It is needless to answer this question, for we have already seen that the plaintiffs upon their own showing have an adequate remedy at law against the administrator, and this is an answer to the relief prayed.

We will not stop to consider the answers and proofs—it is immaterial what may be our opinion upon these; as the bill is wanting in equity it was rightfully dismissed, and the decree is consequently affirmed.

HENLEY *vs.* THE BRANCH BANK AT MOBILE.

1. Misrecitals in a sheriff's deed of the judgment or process, under which the sale was made, will not authorise the rejection of the deed as evidence, in an action by the purchaser to recover possession of land.
2. Where no question is raised in the primary court, by plea or otherwise, as to the right of a corporation to hold land or maintain an action for its recovery, the objection cannot be made for the first time in this court.

3. A tenant is estopped from setting up against his landlord or those who claim under him a title adverse to that which he acknowledged by his tenancy. If he relies on a title acquired after the term of his landlord expired, he should show or propose to show it in connection with his evidence of title.
4. A verdict in an action of trespass to try title, which describes the premises as "lot number twenty-eight in the plat of the town of Pickensville in Pickens county," is sufficiently certain to support a judgment.

Error to the Circuit Court of Pickens. Tried before the Hon. Samuel Chapman.

TRESPASS to try title by defendant against plaintiff in error to a lot of land, described in the declaration as the lot in the town of Pickensville, Pickens county, known in the plat of said town as number twenty-eight. In support of its title the plaintiff below introduced in evidence two judgments in its own favor, founded on the same cause of action—one against Robert Purvis for $2567 97; the other against Warren Andrews for $2480 36; also a writ of *fieri facias* issued on each of these judgments, endorsed as levied on the premises in question, and a *venditioni exponas* on each, commanding that said premises be exposed to sale, &c. The plaintiff then offered to read to the jury the deed executed to it by the sheriff, which deed conveys said lot, but describes the writs, under which the sale was made, as two writs of *venditioni exponas* by which the sheriff is commanded to make of the goods &c. "the sum of $4045 33." To the introduction of this deed the defendant objected, but the court overruled his objection and the deed was read to the jury. The plaintiff proved that on the day the *fi. fas.* were levied, the defendant admitted that he rented the premises from Purvis & Andrews, and that he then held possession as their tenant; and further proved, that within three or four days after the plaintiff's purchase at the sheriff's sale, its attorney continued the defendant in possession at a stipulated rent, and that subsequently, the defendant, alleging that he had acquired a title in his own right, refused to pay the rent, whereupon this suit was instituted. The defendant then offered to show a regular chain of title in himself, derived, since the purchase of the plaintiff and before the commencement of this suit, not from Purvis & Andrews or either of them, but through another and different source, but the

plaintiff objected to the evidence and the court sustained the objection. The court charged the jury that if they believed that the defendant was the tenant of the said Purvis & Andrews, he could not, when sued for the possession of the premises by the purchaser at the sheriff's sale, set up a title adverse to that of the said Purvis & Andrews, the defendants in the executions, and not derived through or from them, although obtained before the institution of this suit. The verdict of the jury described the premises in accordance with the description given in the declaration.

To the several rulings of the court and to the charge given the defendant excepted, and now assigns them and the judgment as error.

P. & J. L. Martin, for plaintiff:

1. The defendant in error has no legal existence as a body corporate, having been destroyed by a public act of the Legislature, of which this court will take notice, and hence has no legal capacity to hold lands, or to sue for the same. See Clay's Digest, 120, §'s 1 & 2.

2. The evidence of title presented by the defendant in error was not sufficient to warrant a recovery of the premises in question, the sheriff's deed being entirely unsupported by the judgments and process thereon, produced in evidence. In this ground, the discrepancies between the levy or return and the deed, the description of the premises sold, and that conveyed, the process under which the same was sold, &c. are included. See 6 Ala. Rep. 221; 2 ib. 682; 4 ib. 321 and 402.

3. The improper rejection of the testimony of the plaintiff in error. The testimony was legal, and ought to have been received; its weight could have been controlled by the charge of the court; as however it was rejected, the plaintiff in error is entitled to the benefit of any chain of title that might have existed, not being permitted to show the character of that offered, or its quality.

4. The charge given by the court below was erroneous upon the testimony before the jury. It, in effect, placed the whole cause upon improper or false grounds, in this, that if the plaintiff in error was the tenant of the defendants in exe-

cution, although their interest may have ceased, still the plaintiff in error could not set up a title from one who had the remainder in the premises, after the expiration of the term of said Purvis & Andrews, his supposed landlords.—Carlton v. Randolph, 8 Ala. Rep. 606; 1 Marshall 99; 2 B. Monroe, 234; 6 Wend. 666; 5 ib. 44; 21 Wend. 121; 6 Ala. Rep. 230.

5. The lands are not sufficiently described by the verdict to authorise the judgment.—Sturdevant v. Heirs of Merrell, 8 Porter, 317; Bennett v. Morris, 9 Porter, 171; Jenkins v. Noel, 3 Stewart, 60; Driver v. Spence, 1 Ala. Rep. 540.

ORMOND, *contra.*

1. The defendant cannot set up a title adverse to his landlord.—Randolph v. Carlton, 8 Ala. 606; Doe v. Eslava, 6 ib. 230.

2. The sheriff's deed cannot be attacked in this collateral way. If any irregularity has supervened, objection can only be taken by the defendant in execution.—Fournier v. Curry, 4 Ala. 321; Ware v. Bradford, 2 ib. 676; Love & Williams v. Powell, 5 ib. 58; Allen v. Best, 6 ib. 234.

3. As to the right of the Bank to sue, that question should have been made in the court below, by plea in bar or abatement, and cannot be raised here for the first time.

4. As to the right of the Bank as purchaser of the title of Purvis & Andrews to the rent, see Coker and Pearsall, 6 Ala. 542. And in addition, it is proved by the record, that the plaintiff in error rented from the defendant in error after his purchase.

CHILTON, J.—This was an action of trespass to try title, &c. to a store house and lot in Pickensville, bought by the defendant against the plaintiff in error. There was a verdict and judgment for the plaintiff below, for the recovery of the lot and two hundred dollars damages for the detention.

Upon the trial the defendant objected to the introduction by the Bank of evidence to the jury of a deed, executed by the sheriff of Pickens county, for the premises in question. This deed is made to the Bank, and recites that the sale was made in virtue of two writs of *venditioni exponas* at the suit of the Bank against Andrews & Purvis, by which said sheriff was commanded of the goods, &c. of the said Andrews & Purvis,

to make the sum of $4045 33, recovered in the Circuit Court of Mobile county by said Bank, &c.

1. The record does not disclose that the objections now urged were made in the court below to the introduction of the deed: But if they had been formally taken, and the points now raised in respect to the variance between the judgments and the executions and the recitals in the deed from the sheriff, ruled by the primary court against the plaintiff in error, still we think there is no error in admitting the deed. It would result in most inconvenient and mischievous consequences, if the deed from the sheriff to a purchaser under execution could be collaterally attacked, and if the purchase could be rendered inoperative by mere misrecitals of the process, when it is manifest the court, by virtue of whose process the sale was made, could amend and set the matter right, and thus render ineffectual a direct application to vacate the sale. This would in effect, enable the party to do collaterally what he could not do directly. In Ware v. Bradford, 2 Ala. Rep. 676, it was held, that a sheriff's deed could not be collaterally impeached for any irregularities in his proceedings, or in the process under which he sells, that all that is essential in such case is a judgment, execution thereon, levy, and the sheriff's deed. So in Love & Williams v. Powell, 5 Ala. Rep. 58–59, it was held, that the sheriff's deed could only be impeached collaterally by showing fraud in its execution, if the process under which the land was sold was supported by an existing, operative and unsatisfied judgment. See also Allen v. Best, 6 Ala. Rep. 234; 6 Porter, 444. The process under which the sheriff in this case sold the land, gave him full power to make the sale, and we think the misrecital in his deed of the power under which he sold, when by reference to the levy it can be sufficiently identified, should not avoid his conveyance any more than the misrecital of the power of attorney in a deed made by an agent. If the subject matter is well ascertained, and the existence of the power is shown which authorises the sale and conveyance by him, a misdescription of the amount of the judgment will not vitiate the deed, if it be shown the sale was made by the sheriff under process issued upon such judgment; otherwise, a *bona fide* purchaser would be responsible for all the errors of the officers of the court, resulting in the want of

strict conformity between the judgments and the executions, and the process and recitals in the sheriff's deed, and thus it would frequently happen his title would be defeated by the clerical misprisions of the officers of the court—see as to such variances, Driver v. Spence, 1 Ala. Rep. 540. The sheriff's deed was clearly relevant testimony and should not have been rejected. The description of the land in the levy is sufficient: more laxity of description is allowed in such case than in private conveyances.—10 Watts Rep. 100. See also Driver v. Spence, *supra;* 1 Watts & Serg. 533.

2. But it is insisted the Bank has no legal existence as a corporation, and cannot therefore hold land, or maintain this action for its recovery. The plaintiff in error relies upon the statute which declares, that the Branch Banks shall be continued in operation soley for the security and collection of their debts and the full settlement and liquidation of their affairs, and "that no real or personal estate shall be taken in payment or settlement of any debt due any one of the said Branch Banks."—Clay's Digest, 120 §'s 1, 2. The question, however, here sought to be made for our revision, is not in any way presented by the record before us, as no objection by plea or otherwise was made in the court below calling in question the right of the Bank to hold land, or its power to maintain the action. The defendant below, having appeared to the action, and having failed to make the objection, must be considered as having waived it, and should not be allowed to make it for the first time in this court. 6 Ala. Rep. 275 and cases cited; ib. 679; ib. 844. But had the power of the Bank to purchase or hold the estate or to maintain the suit been properly questioned in the court below, we should feel no hesitation in adhering to the decision in Martin v. The Branch Bank at Decatur, 15 Ala. Rep. 587, as a correct construction of the enactments.

3. The relation of landlord and tenant having been established, it is clear that the defendant is estopped from setting up a title adverse to that which he acknowledged by his tenancy. In Shelton, et al. v. Doe, *ex dem.* Eslava, 6 Ala. Rep. 230, it was held, that a tenant, when sued for the possession of demised premises by the landlord, is precluded as well during the continuance of the term as after its termination

from calling in question the title of his landlord, or setting up an outstanding title in a stranger. It is further held, that the only effect of a disclaimer of title of the landlord by the tenant is to bar the entry of the landlord after the statute of limitations forbids an entry. 3 Peters Rep. 44; 5 Wend. 246; Randolph v. Carleton, 8 Ala. Rep. 606. These authorities may suffice to show, that the defendant, occupying the relation of tenant to the Bank of the premises sued for, should not have been permitted to prove a title in himself adverse to his landlord, and that the court very correctly excluded his evidence of title. It follows also from what we have said, that the charge of the court was correct. It but affirms the familiar doctrine, that if the defendant held as tenant of the defendants in execution, he could not set up a title adverse to that under which he entered and held, so as to defeat an action to recover the possession, brought by the purchaser under the execution. The plaintiff claimed to hold, and to have purchased the fee, and the tenant recognised this purchase by holding under it and in subordination to such title. The title then he proposed showing he had acquired since the renting and before the suit was brought, was adverse to that his tenancy recognised. If the defendant was in a condition to avoid the estoppel his relation to the Bank created, as, for example if the Bank by its purchase acquired but a term or leasehold interest, which had ceased before he acquired his interest and before the suit brought, he should have shown, or proposed to show, this in connection with his chain of title which he offered to introduce. He did nothing of this sort, but leaving the estoppel in full force from the presumed continuance of his lease, he proposed to override it by proving a title paramount to that of his landlord. The law forbids this. Suppose Henly had been out of the possession and the Bank had been in possession by some other tenant at the time of Henly's purchase—the possession of the Bank would have been refered to the sheriff's deed, and regarded as *prima facie* adverse, so that the deed to Henly, pending such adverse possession, would have been void. So neither shall he take advantage of his possession as tenant to acquire a title which he could not otherwise have obtained. If the circumstances under which he held at the time he acquired the title were such

as authorised him to obtain an outstanding title, he should first have shown this fact, and then the court would have erred in excluding his evidence. The bill of exceptions, which must be construed most strongly against him, shows no such proposal, and the conclusion follows that the exclusion of the evidence offered and the charge of the court were correct.

The verdict, we think, is sufficiently certain to warrant the judgment. It describes the premises as "lot no. 28, in the plat of the town of Pickensville, in Pickens county." Many town lots would scarcely be susceptible of a more particular designation than by their numbers upon the plat of the survey of the town. The area, it is true, might be ascertained and proved, and the boundaries given, if there were natural objects by which to designate the lines; but in the case before us, reference being made to the plat of the town survey, we think the verdict and judgment sufficiently certain to enable the sheriff, without difficulty, to execute the writ of possession. 3 Humph. 626; 2 J. J. Marsh. 388; 4 Munf. 468; 5 Watts, 371. The case at bar is entirely unlike the cases of Sturdevant v. The Heirs of Merrill, 8 Porter's Rep. 318, and Bennett v. Morris, 9 Porter, 171. In the first case, the land was described as bounded on the *west and south by lands which were vacant in* 1804. In the other, the boundary was given thus, "One hundred and twenty feet on the south side of St. Michael's street, *commencing at the centre of the house occupied by James Wilson in* 1817, &c." These descriptions were held too uncertain, as it would have been a difficult, if not an impossible undertaking, for the sheriff to ascertain what lands were vacant in 1804, west and south of the points designated, or what house was occupied by James Wilson in 1817. In the case before us, however, the plat of the town, which is usually preserved, will furnish the sheriff an easy and certain means of executing the process of the court.

We can see no error in the record, and the judgment is consequently affirmed.

ABERCROMBIE *vs.* BRADFORD.

1. An assignment by an insolvent debtor for the benefit of creditors, which, after empowering the trustee to expose the property to sale on the best terms practicable, either at private sale or public auction, for cash or on credit, as shall in his opinion most comport with the interest of all parties concered, requires him, if the property is not sold within six months, to sell it at public auction, &c., is not rendered fraudulent on its face by a provision that the debtor shall retain possession of certain of the property conveyed until a favorable opportunity for the sale of it shall offer—such possession being expressly limited to the time for the sale at public auction.
2. That a trustee is authorised to sell for cash or on credit, as shall in his opinion most comport with the interest of all parties concerned, is not sufficient to affect the validity of a deed of assignment for the benefit of creditors.
3. Where a deed of assignment is not fraudulent on its face, it is competent to show by parol proof that no secret fraud was intended to be consummated by it.
4. Where the trustee by a deed of assignment is given the discretionary power to sell whenever he thinks proper, either at private or public sale, a provision that the assignor shall retain possession of the chattels conveyed, until a favorable opportunity for the sale of them shall offer, does not impair the right of the trustee to reduce them to his immediate possession, or to maintain trover against one who converts them.
5. The wrongful seizure under an attachment of goods in the hands of a bailee, and taking from him a forthcoming bond for their delivery, is such a conversion as will support an action of trover by the owner against the sheriff.
6. The assent of creditors will be presumed to a deed of assignment, which appropriates the property conveyed absolutely and unconditionally to the payment of their debts.
7. Where a deed of assignment is not fraudulent on its face, the possession and use of the property by the assignor, in conformity with the express provisions of the deed, cannot render it void.
8. The fraudulent intent of the grantor alone will not avoid a deed of assignment for the benefit of creditors.

Error to the Circuit Court of Macon. Tried before the Hon. Geo. W. Stone.

This was an action of trover instituted by the defendant, as assignee of John H. Thomas, against the plaintiff in error, to recover damages for the conversion of two slaves, carriage and

horses, household furniture, &c., which were conveyed to the defendant by said Thomas for the benefit of his creditors, and were levied on after the assignment, but whilst in Thomas' possession, by the plaintiff in error, as sheriff of Macon county, by virtue of several attachments sued out against said Thomas. Upon the levies being made, the property was left in the possession of Thomas, he having executed forthcoming bonds, conditioned for its delivery to satisfy the judgments that should be rendered. The remaining facts necessary to a full understanding of the points decided by the court will be found embodied in its opinion.

BELSER & GUNN, for plaintiff in error:

1. The proof was not sufficient to sustain the action. Abercrombie did not by the levy of the attachment convert the property, and he had no control over it, when it was demanded of him. Clay's Dig. 57, § 11; Vincent v. Cornell, 13 Pick. 294.

2. The deed discloses a possessory interest in Thomas in the property levied on subject to attachment. Battle v. Jones, 2 Ala. Rep. 314; Mariott et al. v. Givens, 8 ib. 314; Allen et al. v. Montgomery Rail Road Co., 11 ib. 438.

3. The assent of the banks, whose debts were due prior to the execution of the deed, was necessary to validate it. Elmes v. Sutherland, 7 Ala. 266; Lockart v. Myatt, 10 Ala. 231 and 271; Pinkard v. Ingersoll, 11 Ala. 9; Kinnard v. Thompson, 12 ib. 491.

4. The deed was fraudulent on its face, and could not be explained by Bradford. Hart v. Crane, 7 Paige, 37; Gazzam v. Poyntz, 4 Ala. 374; Ticknor & Day v. Wiswall, 9 ib. 309; Garland v. Rives, 4 Rand. 282.

5. The entire case discloses an attempt on the part of an insolvent to put copartnership assets beyond the reach of copartnership creditors. Such assignments should not be extended, so as to give new and dangerous facilities. Jackson v. Cornell, 1 Sandf. Ch. 348; Geatner v. Trustees, &c. 2 Barb. 628; Cranshaw v. Maule, 1 Swans. 506; Yale v. Yale, 13 Conn. 185.

6. The objectionable features on the face of the deed are, that the trustee can sell the property for cash "OR CREDIT," according to what in his view may be the "INTEREST OF ALL

PARTIES CONCERNED;" that he is not compelled to sell under *six months;* and that the assignor MAY HOLD a portion of the property conveyed for that length of time, or at least UNTIL A FAVORABLE OPPORTUNITY WITHIN THAT PERIOD is afforded to the said trustee to sell it. Hart v. Crane, 7 Paige, 37; Gazzam v. Poyntz, 4 Ala. 374.

7. The deed and schedules show that within two years prior to its execution, Thomas obtained discounts, &c. to more than $20,000, and that while the assets assigned to Bradford are under $14,000, the sums now due for said assets are also upwards of $20,000 more. Again, after Thomas gave the forthcoming bond to the sheriff, Bradford still let the property remain with him. This proves that Thomas believed he had the right to the possession, and that Bradford acquiesced in his assertion of it, and even permitted him to carry a portion of it with him into Georgia, *subsequent to the execution of said forthcoming bond.* It also shows such a conspiracy between the parties, as to make the acts of the one evidence against the other. Frow v. Ferguson, 11 Ala. 883; Walker et al. v. Miller & Co., ib. 1033; Borland v. Mayo, 8 ib. 105.

9. None of the cases cited by defendant's attorneys, in this court, are like this. They are decisions based on mere mortgages, or on assignments without preference, and on different facts. Marriott v. Givens, 8 Ala. 694; Baxter v. Wheeler, 9 Pick. 21.

COCKE, with whom was A. MARTIN, for defendant:

1. The deed of assignment is not fraudulent *per se.* There is no beneficial interest reserved to the grantor.—Ashurst v. Martin, 9 Porter, 566; The Bank of Mobile v. Clark, 5 Ala. 765; Ticknor & Day v. Wiswall, 9 ib. 305; Baxter v. Wheeler, 9 Pick. 21; Vernon v. Morton, 8 Dana, 251; Christopher v. Covington, 2 B. Monroe, 357. The assignee had the right to take possession of the property left in the charge of the assignor at any moment he chose.—Marriott & Hardesty v. Givens, 8 Ala. 694; Baxter v. Wheeler, 9 Pick. *supra.*

2. The deed not being fraudulent on its face, parol proof is admissible to remove any suspicion of fraud which, in the absence of explanation, might arise out of the retention of possession by the assignor. See authorities above cited.

3. The facts disclosed in the record are sufficient to sustain the action of trover.—Glaze v. McMillion, 7 Port. 279; Thorp v. Burling, 11 Johns. 285; Wintringham v. Lafoy, 7 Cow. 735; White v. Morris, 1 Hawks, 301; Pierce v. Benjamin, 14 Pick. 356; Burgin v. Burgin, 1 Ired. 160; Thompson v. Rowe, 16 Conn. 71; Liptrot, adm'r, v. Holmes, 1 Kelly, 391; Christopher v. Covington, 2 B. Monroe, *sup.*

4. The assignment is general, with preferences in the order in which the creditors are named. Their assent will be presumed, and the assignment is valid unless all repudiate it.—2 Story's Eq. § 1036, a., and cases cited in notes; Hodge et al. v. Wyatt et al. 10 Ala. 271; Cunningham v. Freeborn, 1 Edw. Ch. Rep. 256; Tompkins v. Wheeler, 16 Peters, 106.

DARGAN, J.—The first question we propose to examine is, whether the deed of assignment from Thomas to Bradford is fraudulent on its face, as against the existing creditors of Thomas. The deed conveys a stock of goods, debts, accounts, &c., a considerable quantity of land, the house and lot on which the grantor and his family resided, also three slaves, together with a carriage and horses, and household furniture. That portion of the deed relied on to show that it is fraudulent is in the following language: "In order to carry out completely and fully the object and purpose of this conveyance, the said Joseph H. Bradford is hereby authorised and empowered to enter upon the premises and take possession of all and singular the lands and tenements, household furniture, negroes, goods, wares and merchandize, horses, carriage, notes, bills and accounts, without molestation, hindrance or let, and expose to sale, on the best terms practicable, either at private sale or public auction, for cash or on credit, as shall in the opinion of the trustee most comport with the interest of all parties concerned, all the above described lands, goods, negroes, horses, carriage and furniture, and disburse the proceeds as hereinbefore described; provided, that if the lands and other property herein mentioned are not sold within six months, then and in that event it shall be the duty of the trustee to expose all the personal property to sale to the highest bidder at public auction, in the town of Tuskegee, and the real estate to sell in like manner at the county seat in which it is situated,

after giving thirty days notice of the time and place of such sale in newspapers of the county, or the nearest thereto, in which the sale shall be; and provided, however, and it is understood, that the said John H. Thomas shall retain possession of the house and lot on which he resides, the furniture, servants, carriage and horses, until a favorable opportunity for the sale of them shall offer, provided that this right of possession shall not extend beyond the time specified for the sale at public auction of the lands and other property described."

1. The first objection to the deed growing out of this clause is, that it reserves a benefit to the grantor, inasmuch as he is permitted to retain possession of the house and lot, servants, furniture, and horses and carriage, until a favorable opportunity for selling them shall occur. This right to the possession, however, is limited to the time when, by the terms of the deed, it becomes the duty of the trustee to sell at public auction, and which was six months from its date. The principle is too well established by the decisions of this court now to be questioned, that a debtor in failing circumstance may convey his property in trust to pay his creditors, giving by such conveyance preference to some over other creditors—provided he relinquish all control over the property and stipulates for no pecuniary benefit for himself out of the effects assigned, but fairly and honestly devotes the whole for the benefit of his creditors. Ashurst v. Martin, 9 Port. 566; Gazzam v. Poyntz, 4 Ala. 374. In the case of The Planters' & Merchants' Bank of Mobile v. Clark, 5 Ala. 765, the deed of assignment was of a plantation, negroes and stock, and contained a provision that the trustee might, if he saw proper, and under his supervision, permit the grantor to reside on the plantation and to have the management of the growing crop, until the sale should take place according to the provisions of the deed. The court held that this provision did not render the deed void on its face; that if this provision had not been expressed in the deed, the trustee might have employed the grantor to superintend and manage the growing crop, without affecting the validity of the deed, and therefore the provision expressed, as it did not change the operation of the deed, could not stamp it with the impress of fraud or impair its legal efficacy. In the case of Baxter v. Wheeler, 9 Pick. 21, it was decided that a covenant in a gen-

eral assignment, that the grantor should retain the possession of the property and use and occupy it without waste, until the same should be sold according to the terms of the deed, was not *per se* fraudulent. To the same effect is 12 Pick. 451; 11 Wend. 240; Cannon v. Peebles, 2 Iredell. If by the terms of the deed the entire property is appropriated by the grantor to the payment of his debts, without any reservation of interest beneficial to himself and prejudicial to the creditors, the deed cannot be pronounced fraudulent on its face. Here the trustee had the right at any moment to take possession of that portion of the property left by the deed in the possession of Thomas, if a favorable opportunity occurred to sell it, and if no such opportunity offered, at the expiration of six months it became his duty to expose it to public sale. The trustee was the sole judge whether he should sell before the expiration of six months. It *was his duty* to do so, if the interest of the creditors *required it*, and the grantor had no right to resist the exercise of this power by the trustee. This being the legal effect of the deed, we are not authorised to pronounce it fraudulent. Had the trustee taken possession of the property, it would necessarily have been his duty to take care of it, until he met with an opportunity to sell, and that the possession was to remain with the grantor until that opportunity accrued, does not render the deed fraudulent, as the deed made it the duty of the trustee at all events to sell at the expiration of six months, and sooner if an opportunity offered.

2. The next objection to the validity of the deed is, that it authorises the trustee to sell for cash or on credit, as shall in his opinion comport most with the interest of all parties concerned. In the case of Ashurst v. Martin, before referred to, the deed contained a provision that the trustee should sell for such prices and on such terms as he may deem expedient.—The court said in reference to this clause, that such a power was necessary to enable the trustee to execute the trust, but must be exercised in reference to the objects of the trust and the interest of the creditors, in good faith. The power to sell for cash or on good credit does not vary in legal effect from the power to sell on such terms as he may deem expedient, and we cannot pronounce that the reservation of such a power within itself renders the deed void. Some of the debts (as in

this case) may not be due at the time the deed is executed—some may be. It is the duty of the trustee to execute the trust speedily it is true, but yet in such manner as will best subserve the interest of the creditors. He ought to sell for cash or on such credit as will not unreasonably delay the payment of the debts. To require the sale in all instances to be for cash only, may work a prejudice to all or some of the parties interested. We think the trustee ought to have a reasonable discretion in fixing the terms of the sale, and that he is clothed with such discretion as may benefit the creditors, if discreetly exercised, is not sufficient within itself to authorise us to pronounce the deed fraudulent.

3. As we are of the opinion that the deed is not void on its face, it is not absolutely necessary to consider the question growing out of the admission of the evidence to explain how the clause came to be inserted, which provided for the retention of the property by the grantor until an opportunity to sell occurred. It may be proper, however, to remark, that when a deed is void because of fraudulent provisions incorporated in it, parol testimony cannot be received to expunge from the deed these fraudulent provisions; for inasmuch as they exist in the deed and form a part of it, they could not be stricken out by parol proof, and if the deed is fraudulent on its face, no parol evidence can be received to avoid the legal consequences that attach to the deed in consequence of such provisions. The construction of a deed is a question of law, and if by the terms of the instrument it is void, no other judgment can be pronounced than that it is null and void. To sustain a deed void on its face, by resorting to parol proof, would in my judgment be to create a new instrument and then to give effect to its validity. See Grover v. Wakeman, 11 Wend. 187; Gazzam v. Poyntz, 4 Ala. 374. But as the deed is not fraudulent on its face, the admission of the parol proof, showing under what circumstances the provision was inserted, and the intent that governed the parties in inserting it, is not an error of which the plaintiff in error can complain, for the deed being *prima facie* good, the plaintiff had the right to show by parol proof that no secret fraud, not apparent on the deed, was intended to be consummated by it.

4. The deed, through which the plaintiff claimed title, bears

date the 14th day of January 1846, and the defendant, as sheriff of Macon county, levied an attachment on the property on the 20th of February 1846. Thomas, in whose possession the property was at the time of the levy, gave a forthcoming bond for its delivery, retained the property in his possession after the levy, and removed some of it to Georgia, but delivered it up to the sheriff afterwards, according to the condition of the bond. There was testimony tending to show that Bradford demanded the property of the sheriff before suit brought, who replied that he did not have possession of it. The suit was instituted in April 1846. Under this evidence, the defendant requested the court to charge the jury that the plaintiff could not recover, which was refused.

It is contended by the plaintiff in error, that by the terms of the deed the plaintiff below had not such a right of possession as would enable him to bring trover. The general rule is that the person who has the absolute title to the chattel may maintain this action, although he may not have had the actual possession; for it is a rule of law that the general title to personal property creates a constructive possession. 1 Chitty's Pl. 9th Am. edit. 152. The plaintiff must however show, that he is entitled to the right of immediate possession; for if the goods are leased for a term, whereby the lessee became entitled to the possession during the term as against the owner, trover cannot be maintained by the general owner against a wrong doer who converts the goods in the possession of the lessee during the continuance of the lease. 1 Chitty's Pl. 152; 2 Greenl. Ev. §§ 640. But trover may be maintained by the general owner who has delivered a chattel to a bailee or servant that has no right to the possession as against the owner, but who holds it for him. Thorp v. Burling, 11 Johns. 285; Wintringham v. Lafoy 7 Cow. 735. So a gratuitious bailor of cattle may maintain trover against a wrong doer who takes them from the possession of the bailee. 3 Harrison's Digest, title Trover, 6387. These are the general principles by which we are to ascertain whether the plaintiff had such a right to the possession of the property as enabled him to maintain the action of trover, and we think, under the facts of this case, the action can be maintained. The title vested in the plaintiff by the deed drew to it the right of possession, and the possession

that Thomas, the grantor, had under the deed, is like the possession of a gratuitous bailee. It gave him no fixed right or interest in the property for any fixed or definite time,—but he held the property for the plaintiff without any right in, or to it, in opposition to the title or right of the plaintiff. The correct rule, in my opinion, is this, the general owner may bring trover unless the tort was committed on the actual possession of one who had a fixed and determinate interest in the chattel or in the use of it, which entitled him to the possession in opposition to the right of the general owner, and which he could not defeat. Here, Thomas reserves the possession of the goods levied on until a favorable opportunity to sell offered, but certainly the trustee, who was charged by the terms of the deed with the duty of selling, must be the sole judge whether he should sell or not, or when he should sell; he had the right then to put an end to the possession of Thomas at any moment he *saw fit, for the purpose* of selling them. Thomas therefore had no right to the possession which the plaintiff at any moment could not defeat—he occupied the position of one having the care and custody of the goods of another, and trover may be maintained against a stranger by the general owner for a conversion of goods, the possession of which is thus held without a fixed right, in opposition to the right of the owner.

5. We think also that the levy of the attachment and the taking a forthcoming bond, was evidence of a conversion. It is said, that if goods be wrongfully seized as a distress, though they be not removed from the place they were, yet trover may be supported, because the possession in point of law is changed.—1 Chitty's Pl. 154. So when one assumes to exercise control or dominion over goods in exclusion of the right of the owner, it is a conversion, even if there be no manual taking of the goods. Reynolds v. Shuler, 5 Cowen, 323; 7 Cow. 735. Here, the defendant assumed to control the goods by requiring a bond for their forthcoming, and they were delivered to him after suit brought, in pursuance of the condition of the bond. This was an assumption of right or authority over the goods in opposition to the right of the plaintiff, and is a conversion.

6. The defendant requested the court to charge the jury,

that it was necessary for the plaintiff to show, in order to entitle him to recover, that the Branch Bank at Montgomery, one of the prefered creditors, had assented to the deed, or accepted its benefits. He also requested the court to charge that it was necessary to show that all the prefered creditors had assented to the deed, or he could not recover. The deed is one purporting to convey all the property of the grantor absolutely and unconditionally for the purpose of paying the debts in the manner prescribed in it—no condition is prescribed to the creditors before they can receive the benefits of it. To such a deed the assent of the prefered creditors will be presumed. 2 Story's Equity, § 1036, last edition; Tompkins v. Wheeler, 16 Peters' 106; 11 Wheat. 96; Cunningham v. Freeborn, 1 Edw. Ch. Rep. 256; Pope v. Brandon, 2 Stew. 40. If the deed had not been absolute and unconditional, or had it prescribed any conditions to the creditors before they could entitle themselves to its benefits, it would then have been necessary for the plaintiff to have shown that the prefered creditors had accepted the provisions of the deed before the levy was made, and if they had not assented to the deed prior to the levy, the seizure of the property would have worked a revocation of it.—Elmes v. Sutherland, 7 Ala. 262; Hodge v. Wyatt, et al. 10 Ala. 271. Here, however, the deed is executed by an insolvent debtor, and conveys all his assets absolutely and unconditionally—no terms are prescribed to the prefered creditors before they can receive the benefits of it. To such a deed their assent will be presumed.

7. Again, it is contended that the court erred in refusing to give the 14th charge as prayed by the defendant, which was, "that if in connection with the deed to the plaintiff, it is proved that Thomas was insolvent at the time it was executed, and this was known to the parties, and if Thomas had possession of the property at the time the attachment was levied, and the use of the property was valuable to him, and that he carried a portion of it to Georgia, that these circumstances render the deed void, and the testimony of the attorney who drew the deed was insufficient to show it to be fair."

We think the court correctly refused to give this charge for several reasons. The evidence shows that the possession was held in conformity with the terms of the deed, and no benefit

is shown to have resulted to the grantor, unless it was from the temporary use of that portion of the property that the deed provides might remain in his possession until sold. The possession and use shown to have been enjoyed in this case are allowed by the deed, and if the deed be not void on its face, parol proof that the grantor retained possession in conformity with the deed, certainly cannot render the deed fraudulent, although the grantor was insolvent. Nor was there any proof that the creditors, who are prefered in the deed, participated in any manner in any fraudulent intent, even if one existed on the part of the grantor, and it has been repeatedly held by this court, that a deed of trust, or a mortgage, to secure a creditor, is not void because of the fraudulent intent of the grantor, if the creditor did not know of, or participate in the fraud.—Hooks v. Anderson, 9 Ala. 704; Stover v. Herrington, 7 Ala. 142.

It is unnecessary to examine the other assignments of error. The view of the law, as expressed in this opinion, is conclusive to show there is no error, and the judgment must be affirmed.

CHILTON, J., not sitting.

DOE EX DEM. HOLMAN ET AL. *vs.* CRANE ET AL.

1. H. executes to B. his bond, on the face of which no consideration is expressed, conditioned to make him a quit-claim deed to certain lots of land in two years: on the same day, H. and B., who had for some time before been partners in the mercantile business, enter into an agreement, by which B. covenants to use his best endeavors for the term of two years to collect the debts due the firm, and to pay the debts due by it. *Held*—

   I. That under our statute the bond imports a consideration.

   II. That no reference being made in either instrument to the other, and the subject matter of each being entirely different, it cannot be intended that they are parts of one and the same transaction, and the covenant of B. the consideration of the bond.

2. Where the meaning of an instrument is to be collected from the writing alone, it is the province of the court to construe it, and to instruct the jury as to its legal effect.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

This was an action of ejectment brought by the plaintiffs against the defendants in error to recover certain real estate in the city of Mobile. The case was tried on an agreed state of facts, from which it appears, that the premises in controversy were once owned by Oliver Holman, deceased, the ancestor of the plaintiffs, who on the 29th September 1821, executed to Charles Brown a bond, conditioned to make him a quit-claim deed to one half the premises, at the expiration of two years, if the obligee should request him so to do: that before the expiration of the two years, said Holman died, and that Sarah Holman, his widow and the administratrix of his estate, under and by virtue of an act of the Legislature of Alabama, passed in 1823, conveyed to said Brown the other half of the said premises in consideration of the sum of $15,500 as expressed in the deed; and that said premises have since been conveyed by Brown to *bona fide* purchasers for valuable consideration, and that the defendants claim and hold possession under them. It further appears the said Holman and Brown were partners in the mercantile business, and that on the same day that said bond for titles was executed by Holman to Brown, they entered into articles of agreement, by which, after dividing the debts due the firm into two classes, Holman binds himself to bear one half the loss, that may be sustained in case of non-payment of the whole or any part of those included in the first class, and Brown covenants to use his best endeavours for the term of two years to collect said debts, and to divide equally between himself and Holman such as remained uncollected at the expiration of that time: to pay off and discharge, with certain specified exceptions, all demands then existing against the firm, and to indemnify and save Holman harmless against the debts contracted by him, Brown, on his individual account, but in the name of the firm. By this instrument the parties further agreed that the debts due the firm embraced in the second class should be divided equally, whenever any part should be collected, and Brown covenanted to collect them as speedily as possible and pay over to Holman one half of each of said debts so soon as he

should realize the same. The plaintiff agreed that the bond from Holman to Brown should be considered on the trial of this case as having all the effect that it would be entitled to receive in a court of equity, upon a bill filed against the plaintiffs, who are the heirs at law of Holman, for a specific performance, and that if, upon the matters set forth, the defendants would be entitled to a specific performance, according to the principles which prevail in courts of equity, then the bond shall be regarded, in this suit, as a legal title.

The court charged the jury, that the bond from Holman to Brown imported a sufficient consideration without other proof; that there was nothing contained in the covenants of Brown, nor the date of the agreement, from which they might infer that the covenants of Brown constituted the consideration of the bond to Holman; and that their verdict must consequently be for the defendants. To this charge the plaintiffs excepted and they now assign it as error.

Hopkins, for plaintiffs in error:

As both the bonds are dated on the same day the legal presumption is, they were both executed at the same instant. 1 Vesey, sr. 127, 132; Peacock v. Monk, 7 Mon. Rep. (Ky. Thos. B. Monroe) 345, 347. They are therefore part of the same contract, and *the bond of Brown was the consideration of the bond of Holman.*—1 Vesey, sr. 132; 7 Mon. Rep. 345, 347. Why were they made at the same instant if they were not part of one and the same contract? It does not appear that either was executed in duplicate; the part which is the evidence of Holman's rights was delivered to him, and the other part that is the proof of the claim of Brown was delivered to him. It is not necessary to create the legal presumption, that both bonds were made at the same instant, and therefore, parts of the same contract, that each relates to the same subject.—1 Vesey, sr. 132; 7 Mon. Rep. 345, 346. In the first case, the bond relates to a sum of money, and the will to a residuary legacy, which did not include the sum of money. In the case in Monroe's Rep. the *bond* of Aldridge was for the payment of a specified amount of money, payable in merchandise or whiskey, and *the bond* of Wood, the obligee in the bond of Aldridge, was in a penalty, with condition to do work speci-

fied in the condition. The work was to be done by the first of March 1800, and the bond of Aldridge was payable the first of July 1800. One bond was held to be the consideration of the other. The presumption on which this conclusion is founded is decisive of the fact in the absence of all other evidence than the two instruments.—7 Mon. Rep. 347; 1 Ves. sr. 132. Why did Holman make a bond binding him to make a deed to Brown within *two years*, if Brown *should request*, if Brown at the date of the deed had done on his part what the contract for the land required him to do, to give him a right to a conveyance of the legal title? If Brown had previously paid the consideration, the deed would have been made in his favor by Holman, instead of his bond, and at the the date of it. There is no other evidence of any consideration that Brown agreed to give for the land than what his bond in favor of Holman affords. The first covenant in his bond binds him to pay the debts due from the firm of Holman & Brown, and to collect, if he could by the use of his best efforts, the sum of $4870 59 within the term of *two years*, due to the same firm; but if any part of said sum could not be collected within that term, by the use of due diligence, Holman agreed to bear the loss of one half of the uncollected sum, and the notes that could not be collected within the term were to be equally divided at the end of it, between Holman & Brown. The effect of this covenant entitles Brown to the whole of this sum, if it could be collected within the two years, and to the full amount in any event at the end of the two years, as Holman was then bound to pay to Brown one half of the sum that could not be collected, and the other half of any such sum would in effect be in Brown's own hands, as he was bound to supply it. Why did this covenant entitle Brown to the whole of this amount at the end of two years, the same time at which Holman's bond bound him to make a deed for the land to Brown, if he should request? The answer is obvious, and but one can with propriety be made; the consideration of the bond to make title was the covenant of Brown to pay the debts and collect and pay promptly to Holman half of the debts collected of the last class mentioned in the covenant, and the consideration of the covenant of Brown to pay the debts of the firm and make the collections, was the

bond to make title, and the covenant of Holman, that the debts to said amount should belong to Brown, and that at the end of two years he should be in the receipt of one half that amount. If all the covenants in both bonds were contained in either, no one would contend that Brown or his assignee would be entitled to a specific performance without proof that he had paid the debts of the firm and used due diligence to collect the debts mentioned, and paid over the share of such of the last class of debts due to the firm as Holman was entitled to, and promptly as his covenant required. The leading modern rule in the construction of covenants so as to ascertain whether they are dependent or independent, is the intention of the parties.—7 Pike, 138.

According to the agreement in this case, the plaintiffs were to have a right to recover the land embraced by the bond for title in the event only that the effect of the agreed case would entitle the defendants in a court of equity to a specific performance. It is too well settled to render a reference to authorities necessary, that a specific performance will not be decreed without satisfactory proof that the vendee had complied with his part of the contract, and at the time he bound himself to do so.—4 Porter, 297, 374.

The case in 2 Ala. Rep. of Bates & Hines v. The Bank of Alabama 451, does not appear to be a judgment upon the point, whether two instruments, made on the same day, are to be considered as one, in the construction of the contract of the parties. The judgment was on a demurrer to a plea, in which the defendants set up a written contract between them and the bank, and alleged the bills of exchange upon which they were sued were made by them upon that written contract and in the execution of it. The bills and the contract bore the same date. The court below sustained the demurrer, and the judgment was affirmed by this court, by two Judges against Judge Goldthwaite, who dissented. Judge Ormond did not discuss the question as to the effect of the execution of all the instruments at the same time, the Chief Justice did, but it does not appear that Judge Ormond agreed in what was said upon the point. For the plea, the contract and its date, and the bills and their date, see 2 Ala. Rep. 456. These were all construed together by all three of the Judges,

although the contract does not refer to the bills, nor *do the bills refer to the contract.* The effect of what was thus actually done by the court is in favor of the position of the plaintiffs in error. Without acting upon the principle, that the execution of the contract and bills at the same time was presumptive evidence that they were all parts of the same contract, the court could not have made the decision it did. The plea avered that the contract was made before the bills.—2 Ala. Rep. 457. But the court determined that the bills were made first.—Ib. 480. See also 477, 478.

HAMILTON, for defendants in error:

This case was tried by agreement upon the equitable as well as legal titles, and the condition of the present case differs from that in 12 Ala. 373, *only* by the introduction of those articles in proof to the court. Should they operate to change the decision? We think not. The bond of Holman to Brown imports a sufficient consideration.—12 Ala. Rep. 412-3. The articles of agreement between Brown and Holman, have nothing on their face to do with the bond; neither instrument refers directly or indirectly to the other. Each is complete by itself—by itself capable of being construed and fully carried into effect, and gives no intimation of the existence of the other—should they be presumed to be parts of the same transaction? The only similarity, or connection to be found is in their bearing the same date, and executed by the same parties. I submit to the court, that no presumption of connection is to be indulged resting on so slight foundation. The subject matter of the two is not the same—the bond is for the conveyance of *real estate.* The articles of agreement *relate to the proportion of gain and loss to be shared by the parties in certain debts and accounts, and certain mercantile transactions*—besides the articles also *contain mutual covenants to be performed* by the parties, that are dependent, and *may well be deemed considerations for each other;* and there is not the slightest foundation for any presumption of connection outside of the facts of parties and dates being the same. But that is not enough, (see Cornell v. Todd, 2 Denio's Rep. 130,) something more is necessary. In the case in Denio, there was a greater reason for the presumption—the deeds were both for real estate; the

tracts of land were adjoining, and an exception of a portion of the land described in one deed was of a part of the land described in the other—both deeds were between the same parties, and of the same date, yet the court repudiated the conclusions sought to be established from these points of connection.—2 Denio 130. The defendant insists there is no rule, commanding these two instruments to be regarded as parts of the same transaction. A necessary element to be found in the instruments before any such presumption can be indulged is, that *the subject matter* of the two must be the same.—See language of this court, 1 Ala. Rep. 32, Sewall v. Henry. See also language and authorities cited by the Chief Justice, in 2 Ala. Rep. 482: "Several writings, *made at the same time, between the same parties, and relating to the same subjects &c.* constitute," &c. See also the facts and the reason of the courts where the presumption has been permitted.—1 Burrows Rep. 60; 1 Johns. Cases, 95; 15 Johns. Rep. 463; 3 Wend. Rep. 233; 1 Hill's Rep. 601. In all these cases, the identity of subject matter was the controlling circumstance, and that being wanting, and no reference in the deed to each other existing, the rule was held not to apply in the case. 2 Denio Rep. 130. The case cited by plaintiff in error, 7 Monroe, seems to be an exception, and with all respect, seems not sustainable. The intimations thrown out in 2 Ala. 482, and 9 Ala. 32, by this court, carry far more weight, both inherently, from the reason of the thing, and on the ground of authority. The case in 1 Vesey, sr. 127, was a case where the chancellor acknowledged, the court would make *nice distinctions* in favor of creditors.

COLLIER, C. J.—The material questions in this case are whether the bond of Oliver Holman of the 29th September 1821, by which he undertook to give to Charles Brown a *quit claim deed* to certain lands in the city of Mobile, "to be executed in two years from date, if said Charles request," and an agreement of the same date, signed and sealed by both parties, containing reciprocal covenants in respect to their partnership interests, &c., are parts of the same transaction; and whether a specific execution of the condition would be enforced without proof on the part of the obligee, that he had performed any or all the covenants for which he stipulated?

It has been so often decided as to be now a settled rule that several instruments in writing made at the same time, between the same parties, and relating to the same subject, constitute but one agreement, and such a priority in their execution will be presumed as will best effect the intent of the parties.—Stephens v. Baird, 9 Cow. Rep. 274; 1 Fonb. Eq. 436, 5th edit.; Montague v. Tidcombe 2 Vern. Rep. 519; Lawrence v. Blatchford, 2 Vern. Rep. 457; Newhall v. Wright, 3 Mass. Rep. 138; Fowle v. Bigelow, 10 Mass. Rep. 379; Hopkins v. Young, 11 ib. 302; Hunt v. Livermore, 5 Pickens Rep. 395; Sibley v. Holden, 10 ib. 250; Makepeace v. Howard College, ib. 302; Rogers v. Kneeland, 13 Wend. Rep. 114; Bates & Hines v. The Bank of Ala. *per Collier C. J.* 482; Adams v. Hill, 4 Shep. Rep. 215; Duncan v. Charles, 4 Scam. Rep. 561; Strong v. Barnes, 11 Verm. Rep. 221; Reed v. Field, 15 Verm. Rep. 672; Sewall v. Henry, 9 Ala. Rep. 24.

In Aldridge v. Birney & Co. 7 Mon. Rep. 347, it was held that the date and subscribing witnesses to two several writings being the same, it may be inferred that one was the consideration of the other. So where the two instruments are of the same date, between the same parties, and that executed by the complainant is avered in the answer of the defendant to be the consideration of his contract, in the absence of all proof of any additional or different dealings between the parties, the presumption is fair, that one was executed in consideration of the other.—Campbell & Davis v. Harrison, 3 Lit. Rep. 294. See also Johnstone v. Gwathmey & Co. 4 Lit. Rep. 319.

Dillingham v. Estill, 3 Dana's Rep. 21, was an action for the breach of a warranty of soundness contained in a bill of sale of two slaves, to which it was pleaded, that the following writing, viz: "I, Benjamin Estill, release said Dillingham from any responsibility of said negroes, as witness my hand, Benjamin Estill,"—was executed simultaneously with the bill of sale, and was an integral part of the contract of sale, and was intended to operate as a defeasance of warranty. It was objected that the writing pleaded could not be connected with the bill of sale by parol testimony, or by averment merely. The court said, "it has been decided that one writing cannot be connected with another, unless it in some way re-

fers to it. But if that here relied on was contemperaneous with the bill of sale, it can be understood as refering to it, without any parol proof. For surely, if a vendor of slaves makes a bill of sale with warranty, and *at the same time*, the vendee delivered to him a writing, stipulating that he should not be responsible for "the *said negroes*," the latter agreement might, without any extraneous proof, be understood to refer to the former, and to mean that the vendor shall not be responsible on his formal warranty. It would not be inconsistent with either of the writings, or with any rule of evidence, to prove that they were given at the same time; and indeed as that given by the appellee has no date, the fact of identity as to date is far from being intrinsically improbable. Then the fact being sufficiently avered in the plea, is admitted by the demurrer." It is not only allowable to show that the writings were made at the same time, but the circumstances under which they were made, that it may be seen whether they evidence parts of an entire transaction, or what, if any connection, exists between them. Heywood v. Perrin, 10 Pick. Rep. 228; Etting v. The Bank of the U. S. 11 Wheat. Rep. 59; 3 Phil. Ev. C. & H. notes 1420; Wilson v. Troup, 2 Cow. Rep. 195; Sumner v. Williams, 8 Mass. Rep. 214; Fowle v. Bigelow, 10 Mass. Rep. 379; Hopkins v. Young, 11 Mass. Rep. 302; Howland v. Leach, 11 Pick. Rep. 154; Hollingsworth v. Fry, 4 Dal. Rep. 345.

True, the bond executed by Holman and the agreement of Brown and himself, both bear the same date and are attested by the same witnesses, and perhaps if the case of Aldridge v. Birney be recognized as settling a principle of *universal application*, we should be compelled to infer a connection between them, and that one of the writings was the consideration for the other. We, however, think that that case cannot be supported, if we correctly understand it. The same court in the subsequent case of Dillingham v. Estill do not assume that the *simultaneousness* of the date authorised the inference that the *subject matter* was identical; while the connection was fairly inferable from the face of the writings, it is distinctly acknowledged, "that one writing cannot be connected with another, unless it in some way refers to it."

The bond undertaking to give a *quit-claim deed* to one half

of certain lands which the obligor had purchased in Mobile, makes no reference, directly or indirectly, to any other agreement or transaction between the parties; and it cannot be infered from the subject-matter of each that they are in any manner connected—it would be a mere arbitrary assumption, resting upon no certain foundation. But even conceding that both instruments were consequent upon the parnership dealings of the parties to them, and does it follow that the performance of Brown's covenant in respect to the collection of certain notes and accounts, or of any other duty devolved upon him by the agreement, formed any part of the consideration for Holman's bond, or was a condition connected with the execution of the deed? We think not. Such may have been the intention of the parties; but it would be too much, in the absence of *extrinsic evidence*, to assume it as a *legal conclusion*. The omission of the recital of the consideration which induced the execution of the bond, does not impair the obligation, or impose upon the obligee the necessity of proving it by evidence *aliunde*—if the consideration is not impugned, it will be intended to be sufficient. This precise question was thus determined upon the bond now before us, after an examination of our act of 1811 in respect to writings as evidence, in The Heirs of Holman et al. v. The Bank of Norfolk, 12 Ala. Rep. 369. It is not therefore incumbent upon the party claiming under the bond to sustain it, until it is assailed. The opposite party produced no evidence to show the inducements to its execution, and we have already said that the bond and agreement did not *per se* establish their connection, so as to require the obligee to prove a performance of his covenants to entitle him to the deed, which the obligor undertook to "give."

It is argued for the plaintiff, that as Holman undertook by his bond to execute the *quit claim deed* to Brown *in two years, if requested*, and Brown stipulated by his agreement "to use his best endeavors to collect" certain notes and accounts "due to the firm of Holman & Brown, for the term of two years"—after which time the uncollected balance was to be divided between H. & B., it must be inferred that this covenant of Brown was the consideration for the bond by Holman. This argument is founded upon the fact that the limitation as to the time when the parties were to perform their respective en-

gagements is identical; and that the covenants being to be performed at the same time, neither can maintain an action without showing a performance of, or an offer to perform, or at least a readiness to perform his part.—Platt on Cov'nts, 106. If the two writings could be connected as the argument supposes, perhaps the legal conclusion would follow. But as the subject-matter and apparent object is dissimilar, and neither refers to the other in terms, or by obvious implication, we cannot intend that they evidence a single transaction. It would be too much to assume that in making the time when the writings could be enforced the same, it was intended to make the respective stipulations of the parties dependent upon each other.

It may be admitted that where the effect of written instruments depends not merely on their construction and meaning, but upon collateral facts *in pais* and extrinsic circumstances, the inferences of fact to be drawn from them should be left to the jury—"an admixture of parol with written evidence draws the whole to the jury."—Etting v. The Bank of the U. S., 11 Wheat. Rep. 59; 3 Phil. Ev., C. & H.'s notes, 1420; Sewall v. Henry, 9 Ala. Rep. 24. Where, however, the meaning is to be collected from the writing, without the aid of extrinsic proof, it is the province of the court to construe it.—*Ib.* In the present case there was no evidence *aliunde* shewing under what circumstances the writings were executed, or which could in any manner vary their interpretation. It was then the duty of the court to determine their effect from what appeared on their face, and there was no inquiry of fact which should have been referred to the jury.

As then there was no extrinsic evidence to establish the connection of the writings, it would have been competent for a court of equity to have enforced a performance of the stipulation of the bond; and there is consequently no error in the second charge to the jury. The question arising upon the first charge has not been pressed at the bar, and we understand it was decided in The Heirs of Holman et al. v. The Bank of Norfolk, 12 Ala. Rep. 369, in conformity with the ruling of the Circuit Court. The judgment is therefore affirmed.

Dargan, J., not sitting.

HERBERT *vs.* HANRICK.

1. The admission in evidence of a second deposition of the same witness, taken without a previous order, is a matter entirely within the discretion of the primary court, and is not revisable on error.
2. Where no injury to the plaintiff in error could possibly have resulted from the admission of improper evidence, it furnishes no ground of reversal.
3. A subsequent parol ratification by one partner of a deed for land, executed by his copartner in the name of each, is an adoption of the deed as his own, and renders it binding upon him from its date.
4. The Orphans' Court of the county in which a testator dies has jurisdiction to take the probate of his will of real estate, and its decree in such case, however erroneous, cannot be collaterally impeached by a stranger to the proceeding.
5. There is no error in permitting the plaintiff in an action of trespass to try title to give in evidence a notice served by him on the defendant, apprising him of his title and of his intention to claim rent.
6. The possession of one who claims title under a mortgagor is not adverse to the mortgagee, or those who derive title from him.
7. Whether a possession is in fact adverse is a question for the jury, and where there is any evidence from which the jury may infer it, an appellate court cannot undertake to say that an erroneous charge touching such possession has worked no injury on the ground of the failure of the proof to make out the possession adverse.
8. Adverse possession to avoid the deed of a disseisee need not be founded on colour of title: a *bona fide* claim of title, asserted in a manner so notorious and distinct as to charge the vendor with notice, is all that is necessary.
9. Whatever is sufficient to put a party on inquiry, must be regarded as sufficient to charge him with notice.
10. The proof or acknowledgment of a deed of mortgage, without reference to the *form* of the probate, is all that is necessary to admit it to record. (Hobson v. Kissam, 8 Ala. 357, re-affirmed.)
11. The regularity and validity of a trustee's sale, and of the purchase under it, cannot be questioned by a stranger to the deed.

Error to the Circuit Court of Montgomery. Tried before the Hon. John D. Phelan.

This was an action of trespass to try titles to three lots of ground in the city of Montgomery, designated by the numbers 15, 16 and 17, on the south side of Monroe street, and was instituted by the defendant against plaintiff in error. The

plaintiff in the court below introduced as evidence a patent from the United States to John Falconer for 160 acres of land, which embraced the lots in controversy, and a deed from the patentee to Joseph W. Bibb, deceased, for lots 15 and 16 —a deed from the patentee to Joseph Williams for lot 17— one from Joseph to Thomas Williams—one (*unrecorded*) from Thomas Williams to William Ross and Jonathan Crane, who were merchants and copartners—one from Ross & Crane, executed by Crane for himself and Ross, to Geo. Whitman—one from Whitman to Victor F. Mongin—one from Mongin to said Joseph W. Bibb. Having shown title in said Bibb to all the lots, the plaintiff then gave in evidence the record of the will of said Bibb, by which authority was given to his executor, Fleming Freeman, to sell his real estate—a deed for said lots from said executor to said Geo. Whitman—one from Whitman to Jacob D. Worsham—a mortgage from Worsham to Whitman—and a deed from Whitman to the plaintiff, purporting to be founded on a sale made under a power contained in said mortgage, and which deed bears date the 26th January 1841. John D. Ross, a subscribing witness to the deed from Ross and Crane to Whitman, was examined under a commission by the plaintiff to prove its execution, and it appearing from his answers that said deed was executed by Crane for himself and under a power of attorney from Ross, which the witness stated was left among the papers of Ross, Strang & Co., of which firm the witness was a member, the plaintiff sued out a second commission, without a previous order of court, to prove the loss and contents of the power of attorney. The interrogatories attached to this second commission were crossed by the defendant without objection to the issuance of the commission, but when the deposition was offered to be read to the jury, he moved for the first time to suppress it, which motion the court overruled. Other questions raised by the defendant in respect to the deposition are sufficiently noticed in the opinion of the court. It was proven by this witness, and by said William Ross also, that the latter, when he was informed of what Crane had done, approved and ratified it, and in 1843 appeared before a notary public and formally acknowledged the deed. The defendant objected to the record of the will of Bibb, which was offered in evi-

dence on the probate merely, because, although attested by three witnesses, it was admitted to probate on the oath of one witness alone, and for the further reason that the Orphans' Court has no jurisdiction in the matter of the probate of wills of real estate, but the court overruled the objection. The plaintiff, by permission of the court and against the defendant's objection, to fix the date from which the rent commenced, read to the jury a notice served by him on the defendant soon after his purchase from Whitman, informing him of said purchase and that he should look to him for the rent of the premises.—The defendant proved possession in himself of the lots since 1839, and introduced in evidence a deed for lot 17 from Thomas Williams to Charlotte Dexter, dated 21st May 1841, long subsequent to that from said Williams to Ross & Crane, and a deed from her to Andrew Dexter in trust for the sole and separate use of the defendant's wife and her children. Andrew Dexter proved the consideration of this deed from Williams to Charlotte Dexter, and stated upon his examination that he had made the purchase from Williams in the name of Charlotte Dexter at the request of the defendant, which was the reason why the trust deed was executed by said Charlotte; that he searched the records before the purchase without finding any deed from said Williams to any person, but saw the record of the deed from Ross & Crane to Whitman, and upon inquiry of Williams, whether he had parted with his right to the property, was informed by him that he had not made a deed to Ross & Crane, but that they had some claim to it.—The defendant also read in evidence a deed from Worsham to one McGehee for all the lots, which bears date subsequently to the mortgage from the former to Whitman, and a quit-claim deed from McGehee to one Taliaferro, now deceased, dated the 1st May 1840, and offered to prove that Taliaferro stated he had purchased the lots for the defendant's wife and children, but the proof having shown that the purchase of Taliaferro was on a credit, and that he gave his note with one Ware as his security for the purchase money, the latter of whom has paid it since the death of Taliaferro, the court excluded the evidence thus offered.

The court gave three affirmative charges to the jury, the *second* of which was, "that to constitute adverse possession in

the defendant, he must hold or claim under a colour of title, otherwise his possession would not be adverse." The defendant asked the court to charge the jury, among other matters, "that the deed from Thomas Williams to Ross & Crane, not being recorded, is not evidence of notice to any one of their claim, and unless there be proof of *actual* notice of the purchase by Ross & Crane, either to the defendant or his agent, before his purchase and the payment of the purchase money, then the defendant is an innocent purchaser for valuable consideration without notice, &c.;" also, "that the probate of the mortgage from Worsham to Whitman did not authorise its record, and the record is consequently not notice to any one,"—both of which charges were refused. Charges were likewise requested and refused, tending to impeach the fairness of the sale under the mortgage, and of the plaintiff's purchase thereat.

To the several rulings of the court, to the charges given and to the refusals to charge as requested, the defendant excepted, and now assigns each as error.

T. & J. Williams, for plaintiff in error:

1. The court should not have admitted the second deposition of Jno. D. Ross, as it was taken without an order of court.

2. The court should have suppressed so much of the deposition of the same witness as relates to the power of attorney from Ross to Crane: because, 1st—the interrogatory did not call for such an answer; 2d—it was the admission of parol proof of a writing, without a previous predicate; 3d—it was allowing the witness to fix the character of the instrument without giving its contents.

3. The court should have excluded all the proof in reference to the power of attorney: because, 1st—it did not authorise the making of a deed for land; 2d—the ratification by Wm. Ross was not until 1843, long after plaintiff's purchase; 3d—until this ratification the fee was in Ross and no one else could convey it. Fripps v. McGehee, 5 Port. 413, and cases cited.

4. The record of Bibb's will was improperly admitted as evidence, because; 1st—a will can only be proven in solemn form in chancery. Johnson, et al. v. Glascock and wife, 2

Ala. 233; 2d—the Judge of the Orphans' Court has no jurisdiction to take the probate of wills of real estate. 2 Rand. 192; 3d—it was admitted to probate on the oath of one witness alone.

5. The declaration of Taliaferro should not have been excluded, because, 1st—a trust may be raised by parol; 2d—it showed that the defendant claimed as purchaser, and that his possession was adverse to plaintiff's vendor.

6. The court erred in permitting the plaintiff to read to the jury the notice given by him to the defendant.

7. The court erred in its second charge to the jury. Colour of title is not necessary to an adverse possession. Gray v. Moffit, 2 Bibb, 206; 2 Penn. Rep. 452; 1 Root's Rep. 50, 68, 151, 412; 7 Sergt. & R. 177; 10 Serg. & R. 334; Lamar v. Minter, 13 Ala. 31. Whether it be adverse or not is a question of fact for the jury.

8. The deed of Ross & Crane not having been recorded and Charlotte Dexter or her agent having no actual notice of it, the defendant's wife and children were entitled to the protection of *bona fide* purchasers without notice, and the court should have given the first charge requested.

9. The mortgage from Worsham to Whitman, being recorded upon an insufficient probate, was void,—Brock v. Headen, 13 Ala. 375; Shelton v. Armor, et al. 13 Ala. 652; McCaskie v. Amarine, 12 Ala. 22; Sewell v. Glidden 1 Ala. 52; Magee v. Carpenter, 4 Ala. 469; and the second charge requested should therefore have been given.

10. The charges requested in reference to the unfairness of the sale by the trustee and purchase by the plaintiff were proper under the evidence and should not have been refused.

Belser & Harris, & Elmore, for the defendant in error:

1. It is a matter of discretion with the court to permit a second deposition of a witness to be read, and cannot be reviewed in this court. Hester, Wilson & White v. Lumpkin, 4 Ala. 509. The motion was made after the trial had commenced and was therefore properly refused—but even if improper, the refusal cannot be assigned as error. Cullum v. Smith & Conkling, 6 Ala. 625; Wall v. Williams, 11 ib. 826; Spence v. Mitchell, 9 ib. 744. 2d. The testimony of the wit-

ness in answer to the second direct interrogatory was responsive. But if not, no injury has resulted to the plaintiff in error by the admission of the evidence, because, in a subsequent part of the testimony it was proved that Ross was informed of the execution of the deed, ratified the act and acknowledged the deed in writing, and the power was proven to have been lost. Garrett v. Rhea, adm'r. 9 Ala. 134; Fant v. Cathcart, 8 ib. 726; Strawbridge v. Spann, 8 ib. 820; Haynes v. Crutchfield, 9 ib. 189; Early v. Dye & Dye, 14 ib. 158. 3d. The probate of a will in the proper county is final and conclusive as to its validity, and cannot be collaterally impeached. Darrington v. Borland, 3 Porter, 333; 2 Greenl. Ev. § 672, p. 558, and cases cited in note; Tarver v. Tarver, et al. 9 Pet. 180; 1 Story's Rep. 547; 8 N. Hamp. 124; 2 Taylor's N. C. 13; 8 Yerger, 186; 5 Monroe, 42; Clay's Digest, § 10, 598; ib. §s 21, 22, 23, 24, 301; ib. §s 26, 27, (last clause) 302; Johnson, et al. v. Glascock and wife, 2 Ala. 233. A sole executor can sell lands devised to be sold.—Clay's Digest § 14, 598. 4. Notice of the purchase by Hanrick, even if unnecessary, could not prejudice the defendant in the court below. Haynes v. Crutchfield, 7 Ala. 189; Early v. Dye & Dye, 14 ib. 158. 5th. The declarations of Taliaferro were inadmissible—they were irrelevant and tended to vary the deed. 1 Greenl. Ev. § 52, 59; ib. § 278, 315; Jackson, *ex dem.* v. Frost, 5 Cowen, 346; Lamar v. Minter, 13 Ala. 38. 6th. The mortgagor and those who claim under him cannot set up an adverse possession to the mortgagee or his assignees. Wiswall v. Ross & Earle, 4 Porter, 328; 1 Johns. Ch. 575; 3 Vern. 271; 1 McCord's Ch. 397; 5 Cow. 173; 4 Cranch. 419; 3 Dess. 408; Wilson v. Watkins, 3 Pet. 47; Foster v. Goree, 5 Ala. 424; 2 Fonb. Eq. 152. 7th. The court will not reverse for an improper charge, if no injury has resulted. 9 Porter, 403; 1 Ala. 452; 3 ib. 419; 4 ib. 367. 8th. To constitute an adverse possession, it must be *bona fide* under colour of title, and connected with the title. Jackson, *ex dem.* v. Todd, 2 Carne's Rep. 183; Jackson, *ex dem.* v. Ellis, 13 Johnson, 118; Smith, *ex dem.* v. Bentes, 9 ib. 174; Jackson, *ex dem.* v. ——— 18 ib. 40; Jackson, *ex dem.* v. Newton, 18 ib. 353; La Frembers v. Jackson, 8 Cowen, 589; Jackson, *ex dem.* v. Ten Eyck, 5 ib. 346; Livingston v. Penn. Iron Co. 9 Wend. 511; 1 Lomax

Digest, 622; Jackson v. Jackson, 5 Cowen, 173; Jackson v. Hill, 5 Wend. 532; Jackson v. Thomas, 16 Johnson, 293. 9th. There was no evidence that Herbert, or those under whom he held, were purchasers without notice, but the court was bound from the evidence to declare that they bought with notice. 10th. The mortgage having been recorded within the time required by statute, the defect of the probate cannot impair the validity of the record as notice. Hobson v. Kissam, 8 Ala. 357. 11th. The irregularities in a sale by a trustee cannot be questioned by any but a party to the deed. Gray v. Colgin, 11 Ala. 519; Brown v. Lipscomb, 9 Porter, 472; Foster v. Goree, 5 Ala. 424.

CHILTON, J.—We will dispose of the several assignments of error in the order in which the plaintiff's counsel presents them for our consideration.

1. The allowing of the second deposition of John D. Ross to be read to the jury was a matter within the discretion of the judge trying the cause. We are not to presume that the court exercised this discretion capriciously, but on the contrary, that the proof was properly admitted. The matter being one of discretion, is not revisable on error, and consequently the first and second assignments of error cannot be allowed to prevail. Hester, Wilson, White & Co. v. Lumpkin, 4 Ala. Rep. 509, 512.

2. The second objection is, that the court should have suppressed so much of the deposition of John D. Ross in his answer to the second direct interrogatory as went to show that a deed from Ross & Crane to Whitman for a portion of the premises sued for was executed by virtue of a power of attorney. It is insisted that the inquiry made by the interrogatory has no reference to a power of attorney—also, that the witness was giving parol proof of it without its production, and that allowing the witness to speak of it as a power of attorney was permitting him to fix its character and legal effect, without giving its contents, so that the court might determine whether it was in fact the instrument thus designated in legal parlance. The interrogatory reads as follows—"Look upon the deed now shown you at the time of your examination, and then state whether or no you are the subscribing witness

to the same? If yea, state when and where said deed was executed, and who executed the same, and who was called upon to witness the execution thereof?" In response to this interrogatory, the witness answered, that he saw the deed executed the 17th January 1831, the day it bears date—that himself and one E. R. Robinson were subscribing witnesses; "that Jonathan Crane signed for himself and also for William Ross *under a power of attorney.*" The point in issue, as respects the proof here objected to, was the execution of the deed by William Ross. The witness was called upon to prove its execution, he having subscribed it as one of the witnesses. We think it was very proper for the witness to state the manner of its execution—that Ross did not sign it himself personally, but by Crane, who acted under a power of attorney. The answer connects itself with the interrogatory sufficiently in our opinion, to render it proper. Besides, it is the settled rule of practice, that a motion will not be entertained to suppress a deposition, sprung for the first time upon the trial, when such deposition has been taken in conformity to the statutes. Cullum v. Smith & Conklin, 6 Ala. Rep. 625; Carter v. Manning & Jackson, 7 ib. 851; Spence v. Mitchell, 9 ib. 744; Wall v. Williamson, 11 ib. 833–4. In the latter case, it is said to be the duty of the court to protect the jury against the admission of improper evidence, when it is objected to, no matter through what medium it is offered. This is true of evidence which is inadmissible; but where the witness is competent, his evidence taken according to the statute, and the facts deposed to are admissible. Is it not too late after the party goes to trial to suppress any material part of the deposition? Does not the same reason, which forbids the suppression of the whole, equally apply to all the parts of which it is composed? But it is said the proof was illegal in itself, and and under the rule above laid down, liable to be excluded at any time. In an after part of the deposition, it is, we think, substantially shown that the power of attorney was lost. The witness says it was, the last time he saw it, among the papers of Ross, Strang & Co.; that he destroyed said papers, deeming them worthless, and presumes that he destroyed this paper also. It is further made to appear that Ross ratified fully the act of Crane, so that no injury from its admission could pos-

sibly have resulted to the plaintiff in error. The cases of Dye v Earley, 14 Ala. Rep. 158, and Garrett v. Rhea, adm'r, 9 ib. 134, are in point to show, that the admission of such evidence furnishes no reason for reversing the judgment.

3. It is objected in the third place, that the court should have excluded all the proof in relation to the power of attorney, and the ratification by Ross of the act of his partner Crane, in executing the deed to Whitman, because the ratification did not take place until 1843, whereas the defendant in error, (Hanrick,) acquired his title in 1841. This view cannot be sustained—conceding that the general power of attorney given by Ross to Crane, to transact all business relating to the affairs of the firm in his absence, did not authorise the execution of a deed in his name, conveying real estate, still the subsequent ratification of the act by Ross relates back, and makes the deed effectual against him from its date. Wood v. McCain, 7 Ala. Rep. 800, 806, and authorities cited. I am aware of the rule which requires that the ratification of an unauthorised deed made in the name of the principal, must be under seal, but the strictness of this common law rule has been relaxed, when applied to commercial copartnerships and other associations of individuals, operating with joint funds for a common profit. In Green v. Seaton & Bunker, 1 Hall, 262, the authorities are very ably reviewed, and the result deducible from them is strictly stated to be, that although an absent partner is not bound by the deed executed for him by his copartner without his previous authority or permission, or his subsequent assent and adoption, yet such subsequent adoption of the seal as his own will impart efficacy to the instrument as his deed, and the previous authority or subsequent ratification may be by parol—ib. 270; Darst, et al. v. Roth, 4 Wash. C. C. Rep. 471; Ball v. Dunsterville, 4 Term Rep. 313; Lord Lovelace's case, Sir Wm. Jones' Rep. 268; Skinner v. Dayton, et al. 5 Johns. Ch. Rep. 361, S. C.; 19 Johns. Rep. 513; Cady v. Shepherd, 11 Pick. Rep. 400. In the case last cited, the action was upon a covenant under seal, executed in the firm name by one of the partners without the authority of the other in writing. The plaintiff offered proof tending to show a previous assent and also a ratification of the act by parol declarations, and the question was raised whether such parol

ratification made it the deed of both the partners. The court after considering the authorities at some length, held, that a partner may bind his co-partner by a contract under seal made in the name and for the use of the firm in the course of the partnership business, provided the co-partner assents to the contract previously to its execution or afterwards ratifies and adopts it. See also as to the retroactive effect of the subsequent ratification of the contract—Randall v. Van Vetchen, et al. 19 John. Rep. 60; Bank Columbia v. Patterson, 7 Cranch, 297. Story on Part. 180 asserts the general doctrine to be, that a prior authority, or a subsequent ratification, either express or implied, verbal or written, is sufficient to establish the deed as the deed of the firm, and binding upon it as such. See also note 1, ib. The same learned author, in his work on Agency § 239, says, where a principal upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts of his agent, he will be bound thereby as fully to all intents and purposes, as if he had originally given him direct authority in the premises to the extent which his acts &c. reach; the maxim being *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*—ib. § 445; 1 How. Rep. 56. The foregoing authorities we think are quite sufficient to show that the court properly refused to exclude from the jury the proof in respect to the execution of the deed under the power of attorney from Ross, he having ratified the act of Crane, his copartner, by the most unequivocal evidence of his approbation, to wit, his acknowledgement of the deed before a notary public for the purpose of registration.

4. It appears from the bill of exceptions, that one Falconer held the patent from the United States for the land, embracing the lots in question; that he conveyed two of the lots, 15 and 16, to Joseph W. Bibb, on the 4th January 1833, and that lot 17 was conveyed by said Falconer to Joseph Williams on the 20th February 1821, who conveyed to Thomas Williams 11th May 1821, who conveyed to Ross & Crane 20th May 1828, who conveyed, as before stated, to Geo. Whitman, 17th January 1831, who conveyed to Victor F. Mongin 4th May 1831, and he to said Bibb the 1st January 1833. The title to all the lots sued for having been traced to Bibb, it was proposed to show that Fleming Freeman, as executor of said Bibb, on

the 17th March 1834, conveyed them, as such executor, by virtue of the powers confered on him by the will of said Bibb, to one Whitman, under whom the defendant in error claimed title. To show the authority of Freeman to execute such conveyance, the plaintiff below offered the record of the last will and testament of said Bibb, showing that a will was executed by him, 7th July 1833, and although regularly attested by three witnesses, had been admitted to probate by the Orphans' Court of Montgomery county, where said testator died, upon the oath of one witness only. This will, being offered upon the probate without other proof, was objected to by the counsel of Herbert, but the objection was overruled, and it is here insisted: 1st—that the Judge of the Orphans' Court has no jurisdiction to take the probate of the wills of real estate; 2d—that one witness is not sufficient to establish its execution. As to the first of these objections, it is sufficient to say that the 1st and 12th sections of the act of 1806 (Clay's Dig. 300, § 21, and 598, § 10,) confer upon the Orphans' Court the power and jurisdiction of admitting wills to probate. The same jurisdiction is confered by the act of 1821, (after the adoption of the constitution,) which declares that the Judge of each Orphans' Court shall have power within the county to take the probate of wills, grant and repeal letters testamentary, &c.—Clay's Dig. 303, § 31. The court having jurisdiction, it follows that the second position, if it would avail upon a direct application to set aside the probate of the will, cannot be sustained, as it amounts to an attempt on the part of an entire stranger to the proceeding collaterally to impeach it. It may safely be stated as an undeniable proposition of law, that the judgment or decree of the Orphans' Court, which with us has cognisance of the probate of wills, both of personal and real estate, is final and conclusive upon all persons until it is directly impeached as provided for by law. Such was the decision of this court in McGrew v. McGrew, 1 Stew. & Port. 30, and Hilliard & Wife v. Benford's Heirs et al. 10 Ala. Rep. 977–983; see also Cole v. Conolly, at the present term; 2 Greenl. Ev. 630-1, § 672, notes 1, 2—where the authorities are cited. It is not objected in this case, that the will has not the number of witnesses required to give it validity. On the contrary, the bill of exceptions certifies that it was executed

in the presence of three witnesses, but was admitted to probate on the oath of one. The objection is not that the will is void, but that the probate is irregular. The statute affords any party injured by such irregularity the right to an appeal, &c., and in our judgment, we should establish a most ruinous precedent to hold that even after the expiration of five years, when by the terms of the statute the probate becomes final and conclusive, and cannot be impeached by a direct application to chancery by a party interested, a mere stranger may collaterally impeach it. But we need not dwell longer on this point, inasmuch as it is very clear that however erroneous the decree may be, having been made by a court of competent jurisdiction, it is valid until impeached or set aside, and cannot be collaterally called in question. See Apperson v. Cottrell, 3 Por. 51. We need not therefore examine as to the regularity of the probate.—See, however, 8 Ala. 538.

5. There was no error in permitting the plaintiff below to read to the jury the notice which he caused to be served on the defendant, advising him of his purchase and that he should look to him for the rent, &c. The party could not possibly have been prejudiced by its admission, and although it was unnecessary, it was not wholly irrelevant. This court has several times decided that the admission of notices similar in their character was no ground of error.—Haynes v. Crutchfield, 7 Ala. Rep. 189; Easley v. Dye & Dye, 14 Ala. 158.

6. We are informed by the bill of exceptions, that the defendant below produced a deed from Thomas Williams to Charlotte Dexter, dated 21st May 1841, for lot number 17, and also a deed from said Charlotte to Andrew Dexter in trust for the sole and separate use of Mrs. Herbert, the wife of said defendant, dated 28th June 1841. He also proved that he was in possession of said lots before either of these deeds was executed. Said Herbert then introduced a quit-claim deed for lots number 15, 16 and 17, dated the 1st May 1840, from William McGehee and wife to General Taliaferro, and having proved that he was in possession of the premises sued for anterior to the execution of said quit-claim deed, he offered to prove that Taliaferro, to whom McGehee had conveyed, said he had purchased these lots for Herbert's wife and children. It was shown that Taliaferro was dead. This proof was re-

jected by the presiding judge, and constitutes the sixth ground of exception. It is insisted that this proof was legal, as showing an existing trust in favor of Mrs. Herbert and her children, and to explain the character of the defendant's possession, to-wit, that he claimed as a purchaser, and consequently held adversely. It will be observed that the bill of exceptions no where informs us that Herbert was induced to act upon the declarations made by Taliaferro, or that he took or retained the possession of the premises in virtue thereof. Indeed, it does not appear that such declarations were made in his presence, or were ever communicated to him. Neither is it pretended that the deed from McGehee to Taliaferro was executed through mistake, or in any way fails to speak the true intention of the parties. It is not shown that Herbert or his wife or children, the alleged beneficiaries, ever paid any portion of the purchase money to McGehee, or are liable in any way for the same. How, under such circumstances, parol proof of declarations made by Taliaferro, that he was buying or had purchased the lots for Mrs. Herbert and her children, can be admitted in a court of law, the effect of which is to vary the terms of the deed, can be received, we are at a loss to determine. It is true that in many cases parol proof may be received to raise trusts or rebut equities, and to show that deeds absolute on their face were designed as mere securities, &c., but the case at bar does not come within any exception to the general rule "that the deed must be regarded as speaking its own meaning, and cannot be limited, enlarged, or explained by parol evidence, so as to make it operative otherwise than its terms indicate."—Lamar v. Minter, 13 Ala. Rep. 31–38, where the authorities are refered to. Neither can we perceive how the declarations of Taliaferro can affect the question of adverse possession, since, as we have before stated, the defendant's possession is unconnected by any proof with such declarations, and they were not offered in connection with a proposition so to connect them. They are clearly improper as original testimony, since they constitute no part of the *res gestæ*, not having been made at the time of the purchase which they were designed to explain.—Lee v. Hamilton, adm'r, 3 Ala. Rep. 533; Harris v. Taylor, 13 Ala. Rep. 324–328, and cases there cited. But were we wrong in this view, it is per-

fectly clear that the exclusion of the declarations has worked no injury to the plaintiff in error, since, if they tended to show that he claimed to hold under the quit-claim deed from McGehee to Taliaferro, he would thus connect himself with the title of Worsham, which he sold to McGehee, and that title, being but the equity of redemption, could not be set up as adverse to the mortgagee, or to Hanrick, who claims in virtue of a sale made under the mortgage. That one claiming title under the mortgagor does not hold adversely to the mortgagee or his assignee, see Wiswall v. Ross & Earle, 4 Port. 321-28; Foster v. Goree, 5 Ala. 424-7; 3 Peters' Rep. 47; 4 Cranch, 419.

7. Had the evidence shown that the plaintiff in error claimed to hold under the deed from McGehee to Taliaferro, and in no other right, we might conclude this opinion, and dispense with an investigation of the charges, as the question of adverse possession could not arise, according to the view we have above taken. But this does not affirmatively appear by the evidence in the record. On the contrary, there was proof that Herbert went into possession before the execution of the deed from McGehee to Taliaferro, and that he afterwards requested Andrew Dexter to procure a deed from Williams to Charlotte Dexter for lot number 17, who conveyed to said Andrew in trust for the benefit of Mrs. Herbert and her children. These facts having gone to the jury, it was for them to determine upon the character of Herbert's possession. The court could not determine that he claimed to derive his title and to hold *exclusively* under Worsham, the mortgagor, and thus cut off the inquiry of the jury upon the facts above refered to, which, however inconclusive they may be, at least tended to show that he may have entered and held the possession under claim of adversary title. It is said in a learned note to Smith's Leading Cases, 396, (44 Law Lib. 416,) "What constitutes adverse possession, and what evidence is sufficient, are of course questions of law; whether in fact the possession is adverse, or under the owner's title, is for the jury, and the burthen of proving the possession was adverse is upon the person alleging it."—2 Watts, 23–27; 3 Penrose & Watts, 132. If then in the charge of the court to the jury there was error, the proof conflicting as to whether the plaintiff in error held and claimed under the deed from McGehee or from Charlotte

Dexter, or by claim of title exclusive of both, we cannot try the facts, and say no injury has resulted to the party from the erroneous charge, because the proof may fail to make out the possession adverse. The facts are for the jury. Strong v. Strong, 6 Ala. 347.

8. Let us then consider the charge which was given by the court in respect to the question of adverse possession. That assumes, as a legal proposition, "that to constitute the defendant's possession adverse, he must hold or claim under *colour of title*." We understand by this, that the defendant, in the opinion of the court, must not only claim to hold adversely, asserting title in himself, but he must have COLOUR of title—in other words, some deed or written evidence of title. Thus understood, we think the charge erroneous. The authorities cited from New York seem to countenance this doctrine, but this court has never gone so far, and we are not disposed to go farther than our previous decisions have gone. The authorities seem generally to agree, that to constitute a possession adverse there must be an actual entry, *animo clamandi;* the party must hold under claim of title. In Badger v. Lyon, it is said "all the authorities concur that a mere trespass by entry upon another's land does not make an adverse possession, to constitute which, a claim *or* colour of title is necessary."—7 Ala. 567. In 1 Lomax, 622, it is said, "To constitute an adverse possession, there must be a possession under claim of title. A possession for ever so long a time, stripped of the circumstance that it is accompanied by a claim of title, will not amount to an adverse possession, and will constitute no bar to those having the real title." Judge Lomax, in the 2d vol. of his Digest, p. 132, says: "An adverse possession is not the mere holding over by another against the will of the bargainor or grantor at the time the conveyance is executed by him. It is the holding by claim of title adverse to another's title, that constitutes an adverse possession." Mr. Hilliard, in his work on real property, vol. 1, p. 86, distinguishes between a mere trespass, which does not constitute an adverse possession, and a *disseisin*, which does. The latter, he says, must be by entry *at the time* under claim of title, &c.—"The intention guides the entry, and fixes its character." In Hinton v. Nelms, 13 Ala. Rep. 222–230, our previous decisions were reviewed, and the

result of them stated to be, that to avoid a sale made by one out of possession, the defendant must show, 1st—that *at the time* of the sale he had the actual possession; 2d—he must be able to connect his possession with a *bona fide* claim of title; 3d—and which claim of title he openly asserts as hostile or adverse to the title of the plaintiff. From the rule thus laid down, sustained as it is by the authorities above cited, and many others which might be added, we will not depart.—See Angel on Lim. 398, 453 to 455; 3 Conn. 403; 1 Har. & Mc. Henry, 151; 10 Martin's La. Rep. 292; Abercrombie v. Baldwin, 15 Alabama Rep. 363, and the authorities there cited. Under this rule a colour of title is not indispensable to constitute the possession adverse, so as to avoid a deed.—It is sufficient that the defendant assert *bona fide* a claim to the property, in so verible, notorious and distinct a manner as to charge the vendor with notice.—44 Law Lib. 414. It results from this view of the law, that the court erred in charging that a colour of title was necessary to render the possession adverse. It is held by the Supreme Court of the United States, that if a mere trespasser, without any claim or pretence of title, enters into land, and holds the same adversely to the true owner, it amounts to an ouster or disseisin of the owner as to the land actually occupied; but if one enters under a deed or colour of title, then the adverse possession is co-extensive with the deed.—Lessee of Clarke et al. v. Courtney et al., 5 Peters, 519; Ewing v. Burnett, 11 ib. 41; Watkins v. Holman, 16 ib. 25. However this may be as respects the application of the statute of limitations, (and on this point we express no opinion,) we are very sure that the possession of a mere trespasser, who asserts no claim to be protected under the law against champerty, will not operate a disseisin so as to avoid the deed of the true owner. Indeed, the cases refered to hold that the intention to claim the land is *one* of the essential qualities of a dissesin as contradistinguished from a trespass, (11 Peters, 41); and that a bare trespass followed by a subsequent holding without assertion of title constitutes no ouster.—See also 4 Peters, 480–504; Clarke v. Courtney, *supra.*

9. It is insisted that Charlotte Dexter is an innocent *bona fide* purchaser of lot no. 17 from Williams, having paid therefor a valuable consideration, and that her title must prevail

over that of Ross & Crane who had previously purchased of the same individual, but whose deed has not been registered. The law upon this subject is, that whatever is sufficient to put a party upon inquiry, must be regarded as sufficient to charge him with notice. In Chapman v. Glassell, 13 Ala. Rep. 55, we said, want of notice of a fact which is the result of a want of that diligence which the law requires for its ascertainment furnishes no ground for its protection. In the case before us, Andrew Dexter was the agent of Charlotte, or rather of the plaintiff in error, at whose request he acted, to make the purchase from Williams, and he proves that at the time he was informed by Williams that Ross & Crane had some claim to the land. He also states that he saw the record of a deed from Ross & Crane to Whitman. This was sufficient to put the party upon inquiry, and the fact that one of the firm of R. & C. was dead, and that the other resided out of this State, could make no difference, as respects the effect of the information which Dexter received. 1 Story's Eq. Jurisp. § 399 to 400, a. and authorities cited in note 4, p. 428, 4th edit. This view relieves us from the necessity of examining the effect of the failure to register the deed from Williams to Ross & Crane. Scroggins v. McDougald, 8 Ala. 382.

10. It is further insisted that the mortgage from Worsham to Whitman has not been recorded as required by our acts of registration, and that it is void as against the claim of Taliaferro, who is a subsequent purchaser. The certificate on the mortgage from Worsham to Whitman, is in the following form: "The State of Alabama, Montgomery county, personally appeared before me the above named Crawford M. Jackson, a subscribing witness to the foregoing instrument, and on oath, saith that he saw J. D. Worsham sign, seal and execute the same as his own act and deed, and that it was by him so executed in the presence of the other witnesses. May 30th 1835"—signed by the clerk. By the act of 1833 § 3, (Clay's Digest 152 § 2,) it is provided that no deed shall be admitted to record, &c. unless it shall have been first acknowledged or proved and certified, in the manner directed. The act of 1812 prescribes the form of the certificate of acknowledgment or probate of deeds, &c. (Ib. § 7,)—the substance of which must be complied with. See Clay's Digest, 153 § 9.

By the act of 1828, provision is made for recording deeds of trust, and the 3d section provides "such deeds and conveyances of personal estate shall be proved or acknowledged *as deeds and conveyances of real estate.*"—Clay's Digest 256, § 7. Were the question as to the form of the acknowledgment or probate of deeds of trust an open one, we should not be able to resist the conclusion, that the legislature designed that the substance of the form, required to be pursued to admit absolute deeds of real estate to record, should be pursued as to them. When the statute says they shall be proved or acknowledged "as deeds of real estate," it would seem to mean something more than that they should be barely proved or acknowledged. If it did not, the remaining portion of the sentence, "*as deeds &c.*" would be purely expletory, having no meaning whatever. This, however, would be opposed, it seems to me, to be the well settled rule of construing statutes, which requires, that every clause and word shall be presumed to have been intended by the legislature to have some force and effect, and that a statute must be so construed, as that no clause, sentence or word shall be superfluous, void or insignificant. See 22 Pick. Rep. 571; James v. Dubois, 1 Har. 285; Hutchens v. Niblo, 4 Blackf. Rep. 148. The act of 1812 prescribing the form for the proof, &c. of deeds of real estate, if we were for the first time construing the act of 1828, we should feel constrained to hold that deeds of trust should be proved or acknowledged *in like manner* as deeds, &c. of real estate. But a different construction has been placed upon it in the case of Hobson v. Kissam & Co. 8 Ala. Rep. 357, where it was held that it was only necessary to admit trust deeds to record that they be proved or acknowledged, without regard to the form prescribed by the act of 1812, which was applicable only to absolute deeds. That decision proceeds upon the ground that the act of 1828 was designed to admit the deed to record for the purpose of notice, whereas, by the act of 1803, an absolute deed of real estate properly certified was allowed to be used as evidence upon the acknowledgement or probate without further proof. According to this decision, from which we are not at liberty to depart, since rights must be supposed to have vested under it, the proof of the execution of the mortgage in the case at bar, as the same appears

in the certificate above copied, is sufficient to admit it to record. In the case of Brock v. Headen, 13 Ala. Rep. 370, which was a controversy in respect to property conveyed by a trust deed, the court gave an intimation opposed to the decision in Hobson v. Kissam & Co. having overlooked the last named case. The point, however, was only incidentally involved in Brock v. Headen, and did not influence the decision of the cause. Indeed a conformity to the previous decision in 5th Ala. would have made the case, which was affirmed, still more conclusive against the plaintiff in error, who claimed in opposition to the deed. No injury then has resulted or can result from this dictum in the latter decision, so that we may reaffirm Hobson v. Kissam as settling the rule, by which we shall hereafter be governed. This we do, because rights have doubtless vested under it, which it would be unjust to disturb.

11. The charges which question the regularity of the trustee's sale to Hanrick, may be readily disposed of. The legal title to the premises being in the trustee, and he having conveyed to the defendant in error, it is not for a stranger to the deed to object that the sale was not made in conformity with the power confered by the deed. See Brown v. Lipscomb, 9 Por. Rep. 472; Gary v. Colgin, 11 Ala. Rep. 514, 519; Foster v. Goree, 5 Ala. Rep. 424. The same may be said with respect to the consideration of the deed to Hanrick, and of the previous transfer of the notes given to secure the purchase money by Worsham to Whitman, which constituted the consideration of the mortgage. The deed from the trustee in whom was vested the legal title, vested that title in Hanrick, unless it was void by reason of an adverse possession in the plaintiff in error, and hence the questions attempted to be raised by these several charges could not properly affect the result of the cause. If the plaintiff in error claimed through Worsham, the mortgagor, and could show that before the sale the mortgage had been fully satisfied, a very different question would arise, but this is not pretended. See as to the effect of the trustee's deed, Huckaby v. Billingsley, at this term.

The importance of several of the principles involved in this cause, and the zeal, ability and apparent confidence with

which it has been argued on both sides have induced me to notice the several points more at length than I otherwise should have done. For the error in the second charge, the judgment of the Circuit Court must be reversed, and the cause remanded.

HOGAN ET ALS. *vs.* SMITH ET ALS.

1. An answer responsive to the allegations of the bill, or to interrogatories therein, which the defendant is bound to answer, is evidence for him and must prevail, unless outweighed by other testimony.
2. Where the allegations of a bill authorise any decree whatever against a defendant, who is in contempt, it is error in the chancellor to dismiss it as to him.
3. A party to a deed or other instrument, who alleges a mistake in drawing it, must become an actor in seeking to reform it; until reformed, it is the highest evidence of the contract, and cannot be contradicted or varied by parol proof.
4. The interest of a vendee of land, who holds a bond for titles and has paid the purchase money, cannot be sold under execution at law, and such sale confers no title upon the purchaser.

Error to the Chancery Court at Wetumpka. Tried before the Hon. Wilie W. Mason, chancellor.

THE bill was filed in May 1843 by the plaintiffs in error as judgment creditors of Thomas W. & John Smith, partners using the firm name of T. W. Smith & Son, and alleges that one or both of said firm have an equitable intersst in various tracts of land in Coosa county, viz, the W. 1-2 Sec. 17, T. 23, R. 20—the E. 1-2 18, in the same Township and Range—the W. 1-2 19, T. 24, R. 18—the E. 1-2 31; T. 24, R. 19.—a half section of land with a mill on it near Sockapatoy in the possession of said John Smith, and lots number 20, 21, and 28 in the town of Sockapatoy, with other lands unknown and of and concerning which discovery is sought. The bill further alleges that the complainants have no means of ascertaining with certainty in whom the legal title to said lands is vested; that the said T. W. Smith & Son were engaged with Joseph H. Bradford and Walker Reynolds in buying lands, and ope-

rated in the name and by their agent Wm. T. Stamps, who has in his hands, as they believe, effects belonging to said T. W. Smith and Son or one of them; that said Stamps pretends to have purchased from said T. W. Smith & Son a large stock of goods, worth two thousand dollars, but for which he has never paid any thing whatever; that said Bradford owes the said Smith & Son, and may have the legal title to all or some of the lands in which the said Smith & Son are interested. Bradford, Reynolds and Stamps with John Smith, Thos. W. Smith having died, are made parties defendants, and a discovery, account and general relief are prayed. Decrees *pro confesso* were taken against John Smith and Stamps for want of answers. Bradford answers, that John Smith in May 1837 purchased of him the S. 1-2 Sec. 21, T. 24, R. 19, for which he paid him $400 and received his bond for titles, since which time one Burgess has exhibited to him Smith's bond for titles to said land; that in the same year he sold to a brother of John Smith either the E. 1-2 11, 22, 5, or the W 1-2 12, 22, 6, he thinks the former, and executed a bond for titles to John Smith; that he knows nothing of the title of the W. 1-2 of 17, and E. 1-2 of 18, 23, 20, but thinks that the mill spoken of in the bill is on one of these tracts; that the N. 1-2 19, 24, 18, which was certified to himself and Stamps, has been sold—his interest to one Blankenship and Stamps' interest to said Smith—and that Smith's interest has since been sold to one Foscue at sheriff's sale, under execution. He further states that Stamps and one Shelton were interested with him in the purchase of lands, he furnishing the purchase money, and they to have one fourth of the net profits each, after its reinbursement; that Stamps afterwards in 1836 transfered his interest in the lands purchased to Smith, and Smith sold to him Bradford, at the same time, his interest in five of the half sections; that subsequently in the same or next year he purchased from Smith his interest in four other half sections of the land, and that the balance of the Stamps interest in said lands was on the 22d July 1840, tranferred to said Foscue. He denies having any effects of either of the Smiths in his hands or being indebted to either.

Reynolds answers and denies that he has the legal title to any land whatever in which either of the Smiths have any in-

terest, or that he owes them or has any of their effects in his hands.

Upon the coming in of these answers, the plaintiffs amended their bill and brought in Burgess & Foscue as defendants. Foscue answers that he did not purchase the N. 1-2 19, 24, 18, from John Smith, but bought it as his property at sheriff's sale, and holds the sheriff's deed; that in 1840, he received in payment of a debt of $800, due him by Smith, a transfer from him of all the remaining interest he had in the lands purchased of Stamps; that Smith had also purchased from Shelton his interest in the lands bought by Bradford, Shelton & Stamps, and that said transfer from Smith to him was intended to embrace the Shelton's interest also, but that it was omitted by mistake, and the defendant prayed a reformation of the instrument of transfer in that respect.

The answer of Burgess is sufficiently noticed in the opinion of the court. The testimony of Bradford, who was examined as a witness, shows that he has the patents in his own name for each of the pieces of land purchased by himself, Stamps & Shelton.

The chancellor dismissed the bill on the final hearing as to all of the defendants, which is now assigned as error.

McLester, for plaintiffs in error.

Morris, *contra.*

DARGAN, J.—The answer of Reynolds is responsive to the bill. It denies that Smith has any equitable interest in the lands to which the respondent has the legal title. There is no proof to show the interest of Smith, and consequently the bill was properly dismissed as to him. We also think the bill was properly dismissed as to Burgess. His answer shows that he purchased the equitable interest of Smith in the town lots and one half section of land before the bill was filed. The complainants by their interrogatories call on him to state the consideration he paid to Smith, and he states that he paid eight hundred dollars for the town lots and five hundred dollars for the half section. The answer of Burgess being responsive to the interrogatories that the complainants required him to answer, becomes evidence in the cause, and the plain-

tiffs cannot complain because the answer throws on them the burthen of proving a negative. The rule is settled that an affirmation in an answer need not be proved if it be responsive to the stating or charging part of the bill, or if it be responsive to an interrogatory which the defendant is required to answer.—Sayre & Converse v. Fenno, 3 Ala. 478; The Bank at Huntsville v. Marshall, 4 Ala. 60. The defendant was called on by the complainants to declare the consideration paid by him for the lands—his answer therefore must be evidence, and if it deny the equity of the complainants the bill should be dismissed, unless there is other evidence that outweighs the evidence afforded by the answer.

But the court erred in dismissing the bill as to Smith and Stamps, who did not answer, and against whom a decree *pro confesso* was taken. The allegations of the bill as to them were confessed, and the complainants are entitled to such a decree against them as the bill will authorise to be rendered, consistent with the rights of the other defendants as to whom it was properly dismissed.

The court also erred in dismissing the bill as against Foscue. It appears that Bradford, Stamps & Shelton were engaged in buying Indian lands: Bradford furnished the money, and Shelton and Stamps made the purchases. The agreement between them and Bradford was, that Shelton and Stamps should each receive one fourth of the net profits, after the purchase money was refunded to Bradford: Smith purchased from Shelton his interest, and afterwards acquired the interest of Stamps. The transfer of Smith to Foscue only conveys the interest of Stamps, and does not embrace the interest of Shelton. It is true, that Foscue in his answer says, that his purchase was intended to include all the interest that Smith had, both that which he had acquired from Shelton as well as the interest acquired from Stamps, and that there was a mistake in drawing the transfer in omitting to insert the interest acquired of Shelton. Although a court of equity upon clear proof of a mistake in drawing a deed, or other instrument, will correct it, we think this can only be done at the suit of him whose interest is affected by it, that is, the party alleging the mistake must become the actor, and seek a reformation of the deed according to the terms of the agreement

When the deed is reformed by a decree, it will then be evidence of the contract or agreement entered into by the parties, but until the mistake is corrected and the deed reformed, the deed or instrument in writing is the highest evidence of the contract, and cannot either at law or in equity be contradicted or varied by parol proof. Foscue is not a complainant, nor does he seek by a bill to reform the contract, but insists as a defendant on a mistake, and attempts by parol proof to show it. To permit this would voilate one of the first maxims of evidence. The interest then that Smith, the defendant, acquired of Shelton should have been subjected to the payment of complainant's demand, for there is no legal testimony to show that this interest was ever transferred by Smith. The interest however that Smith acquired of Stamps has been transfered to Foscue, and his answer, which is responsive to the bill, shows that the transfer was for a valuable consideration, and without fraud. The complainants cannot subject this interest to the payment of their debt.

But it is very clear that the interest of Smith, whatever it may be, to the north half of section 19, township 24, range 18, should have been subjected by the decree to the complainant's demand. The evidence of Bradford in connection with the exhibits attached to Foscue's answer, shows that Smith had but an equitable interest in this land, the legal title being in Bradford. In the case of Elmore & Willis v. Harris, 13 Ala. 360, we held, that a defendant in execution who held only a bond for titles, had not such a title as could be sold under execution at law, notwithstanding he had paid the purchase money, and was in possession of the land. This decision is conclusive to show that Foscue acquired no title by his purchase at sheriff's sale, and he does not pretend to claim title to this land in any other manner. As the interest of Smith in this half section, and the interest Smith purchased of Shelton in all the lands claimed by Foscue should have been subjected to the payment of the debt of the complainants, the decree as to Foscue must be reversed.

The legal title, so far as we are advised, to all the land in which Smith had an interest derived from Shelton, is still in Bradford. Bradford is therefore a necessary party to a bill seeking to subject that interest, and consequently the chancel-

lor erred in dismissing the bill as to him. Although the interest of Bradford to the extent that he claims by his answer is clearly not liable in any manner for the satisfaction of the debt, yet as he holds the legal title, he is a proper party to the bill seeking to subject the equitable interest of Smith.

The decree so far as it dismisses the bill as to Reynolds and Burgess is affirmed, but it must be reversed as to Smith, Stamps, Foscue and Bradford, and the cause remanded for further proceedings as to them.

CHILTON, J., not sitting.

THE GOVERNOR, USE, &c. *vs.* BANCROFT ET AL.

1. Where in an action on a sheriff's bond the breach assigned is that he failed to pay over to the plaintiffs the proceeds of goods sold under process, a plea avering "that while the said money was in the custody of the law, one Claude Beraujohn, by motion made, &c.. in pursuance of notice by him previously given, &c., obtained the direction of the court to pay over to said Beraujohn the sum of $105, which remained due him for the rent of the premises, whereon said goods were when seized, which said amount was paid to said Beraujohn, and the remainder to the plaintiff's attorney before action brought," is not bad for duplicity.
2. The lien of a lessor on the goods and chattels upon the premises, for the rent due at the time of their seizure under attachment or execution, may be enforced by motion to the court to which the process is returnable, to direct an application of so much of the proceeds of the sale as may be necessary to discharge it.
3. A motion entered on the docket, with the memorandum of the Judge written across it showing his action thereon, though not spread upon the minutes of the court, is *quasi* a record and admissible in evidence to prove the facts which it imports.
4. Where a plea is pleaded in short *by consent* and the plaintiff demurs, he cannot object that the plea does not inform him with precision of the evidence by which the defendant intends to make out his defence.
5. Where the return of a sheriff upon a writ of attachment fixes on him

a liability to the plaintiff, it is not competent for him in a suit by the latter founded on such return to prove that it is incorrect. In such case, a direct application for leave to amend the return should be made to the court whence the process issued.

Error to the County Court of Mobile. Tried before the Hon. John A. Cuthbert.

This is an action of debt by the plaintiff, for the use of Whitsett, Garner & Co., against the defendants in error, on the official bond of Charles Bancroft, late sheriff. One of the breaches assigned is that an attachment ancillary to a suit then pending in the County Court of Mobile county was sued out by said Whitsett, Garner & Co. against one Felix Maxam and delivered to said Bancroft, who as such sheriff levied it on a large quantity of merchandize, which he failed to secure so as to have forthcoming to satisfy the judgment. Another is that he sold the goods levied on and failed to pay over the proceeds of sale to said Whitsett, Garner & Co. The defendants filed three several pleas, the third of which is, that from the proceeds of the sale, after deducting the costs, &c., there remained in the sheriff's hands but the sum of one hundred and seventy-three dollars and thirty-three cents, "and that while the said money was in the custody of the law, one Claude Beraujohn, by motion made before this honorable court, in pursuance of notice by him previously given said sheriff, and after notice given the attorney of the plaintiff in this action, obtained the direction of the court to pay over to said Beraujohn the sum of $105, which remained due him for the rent of the premises whereon said goods were when so seized, which said amount was paid to said Beraujohn, and the remainder of said money to the plaintiff's attorney before action brought," &c. To each of the pleas the plaintiff demurred, and the demurrer was sustained as to the two first, but overruled as to the third plea. The defendants then by leave of the court amended their two first pleas, rendering them in substance pleas of performance of the conditions of the bond. This was done "in short by consent." The plaintiff demurred to each of these amended pleas, but the court overruled the demurrers. The plaintiff introduced in evidence the return of the sheriff on the writ of attachment. The defendants offered as a wit-

ness one Austin, who was a deputy of Bancroft, and as such had made the levy of the attachment, having first executed to him a release. The plaintiff objected to his competency, notwithstanding the release, but the court overruled the objection and allowed him to testify. The witness stated that the sheriff's return on the writ of attachment was incorrect in this, that the levy was among other things on ten pair of brogans, instead of "ten dozen brogans," as mentioned in the return. To this evidence the plaintiff objected, but the court overruled the objection and the evidence went to the jury. The defendants then introduced the motion docket of the County Court, and offered to read a motion made by Claude Beraujohn against the defendant Bancroft, with the judge's minute thereon, conforming to the allegations of the third plea. The plaintiff objected to the evidence, but the court overruled the motion and suffered them to be read to the jury, it having been first made to appear that the clerk had omitted to enter them on the minutes of the court. To the several rulings of the court the plaintiff excepted, and now assigns them as error.

Douglas Smith, for plaintiff in error:

1. The third plea sets out no sufficient defence to the breach assigned. The court has no jurisdiction to direct the money collected under the attachment to be paid to Beraujohn, who had not proved before any tribunal that any debt was due him. Such summary proceeding is unauthorised by statute or common law. A party must obtain a judgment before a court of common law can order money of other persons to be paid to him.—Ayres v. Dobson et al., 5 Stew. & Porter, 441; Westfelt v. Lewis, 2 McLean, 511. Besides, the plea is bad for duplicity.—11 Ala. 550.

2. The amended pleas were insufficient. When a breach of the condition of a bond is specially assigned, a general plea of condition performed, without setting out the mode and manner of performance, is bad.—Tait, use &c. v. Parkman & Weaver, 15 Ala. 253; Postmaster General v. Cochran, 2 Johns. 415; Turner v. Arley, 15 Pick. 546; United States v. Bradley, 10 Peters, 243; 3 Blackf. 121; 2 Ala. 421.

3. The judge's minutes were not evidence, and should not have been admitted.

4. Parol evidence is inadmissible to contradict a sheriff's return. It is conclusive upon and cannot be disputed by him. Woodward v. Harbin, 1 Ala. 104; Figh & Blue v. Mead, 4 Ala. 297; Price v. Cloud, 6 ib. 284; Clarke v. Gary, 11 ib. 98; Gardner v. Hosmer, 6 Mass. 325; Weld v. Bartlett, 10 ib. 470; Wellington v. Gale, 13 ib. 483; Simmons v. Bradford, 15 ib. 82; Purrington v. Lowry, 17 ib. 392; Welch v. Joy, 13 Pick. 477; Baker v. McDuffie, 23 Wend. 289; Lawrence v. Curtis, 2 Ashm. 127; Temple v. Coulson, 9 Watts & S. 62; 3 S. & M. 409; 1 Meigs, 122; Lewis v. Blair, 1 N. Hamp. 70; 8 ib. 546; 9 ib. 76; 10 ib. 103; 9 Shep. 14; 4 Pike, 184; 3 B. Mon. 344; 2 Term Rep. 148; 2 Com. Dig. 287.

Rapier, for defendants in error:

1. There was no error in overruling the demurrer to the third plea. The plea is responsive to the thirdly assigned breach, and will be intended to apply thereto. The plea confesses, but justifies and avoids. If the sheriff had an execution for costs against Maxam, it was his duty to satisfy it from the goods attached; and assuming that Beraujohn had a claim of $105 for rent, as alleged, his lien was paramount to that of the plaintiff's, and he would have been justifiable in discharging the lien with or without directions from the court.—Clay's Dig. 210, § 45. The plea is not demurrable for duplicity.—2 Port. 145. Though the plea were defective, it ought not to prejudice the defendant, because it may be regarded as having been abandoned when the substituted pleas were filed.—4 S. & P. 52. The substituted pleas, which were in short by consent, were ample by intendment, and fully responsive to the assigned breaches.—See 7 Ala. Rep. 791; 8 ib. 173.

2. There was nothing in the relation of the sheriff to his former deputy to render the latter, after he had been released, an incompetent witness for the defendants.

3. The rule that the return of a sheriff cannot be contradicted, though general, is not universal. There are cases to be found, where the rule has been held not to apply. The true rule deducible from the authorities is, that for the purpose of invalidating the sheriff's proceedings, or defeating any right acquired by means of them, the truth of his return cannot be called in question—See Lewis v. Blair, 1 N. H. Rep. 68; 2

Burrows' Rep. 950; 3 ib. 1243; 3 Dyer, 348, b.; 11 East. 296. There is another limitation to the application of the rule. The return of any collateral fact, not necessary to be returned in order to render his proceedings valid, may be traversed.

4. Though the court below erred in admitting the witness to show a mistake in the memorandum of the goods attached, yet it was an error in favor of truth and the justice of the case. For this reason the rule, which is conventional, should not be applied. It is one of the class of cases, where, though there is error in the primary court, the judgment will nevertheless be affirmed.—See 2 Stew. 172; 3 ib. 185; 3 Ala. Rep. 599; Johnson et al., assignees, v. Smith, 2 Burrows, 961-2-3, 966.

5. The memorandum of the judge granting the motion of Beraujohn was correctly admitted in evidence. It was a *quasi* judgment and record, and the best evidence in the absence of an entry upon the regular minutes. It was the basis of a judgment *nunc pro tunc* at any subsequent term.—4 Ala. 214; 3 ib. 281. It was competent for the court, on motion, to direct the application of the money in the hands of the sheriff.—1 Ala. 292. At all events, the sheriff would be protected by the judgment of the court.—10 Ala. 92.

COLLIER, C. J.—1. The third plea merely states the amount produced by the sale of the goods alleged to have been seized under the attachment against the estate of Maxam, and how it had been disposed of; if the disposition of this money by the sheriff was legal, the plea is not objectionable for duplicity, or any other ground upon which its validity has been assailed.

2. In respect to the claim of Beraujohn for the rent of the premises on which the goods were seized, it is well settled that the act of 1807 "concerning executions, &c." which inhibits the removal of goods and chattels levied on by execution from any messuage, lands &c., leased &c., until the the payment of the money due for the rent of the premises, gives to the lessor a lien for the rent due at the time of the levy of a *fi. fa.* or attachment on such goods and chattels.—Clay's Digest, 210, § 45; Whidden v. Toulmin, 6 Ala. Rep. 104. And in Denham & Warford v. Harris, at the last term, it was held that the lien might be summarily enforced, by the court to

which the process was returnable directing the sheriff to discharge it from the proceeds of the sale of the goods, in preference to the demand of the creditor at whose instance they were seized. In that case the lessor proceeded by petition and notice to the sheriff and creditor, but we can perceive of no objection to either the sheriff or the lessor moving the court for such an order as may be proper, and the parties interested may be brought in by notice and their respective interests adjusted. This is the usual mode of proceeding where money collected by an officer of the court under legal process is claimed by several persons. It is a convenient practice, and one in which the rights of all parties can be quite as well protected as if a suit was brought by action; for the party supposing himself aggrieved may prosecute a writ of error and have the matter reviewed. Besides, this remedy commends itself by its cheapness, simplicity and expeditiousness; and having been applied to enforce a statute in favor of a party whose claim was not ascertained by judgment, we feel no inclination to hold a different doctrine. See also Wheeler & McCurdy v. Kennedy, 1 Ala. Rep. 292; Henderson v. Richardson, 5 Ala. 349. If the sheriff had paid to Beraujohn the amount for which he had a lien on the goods attached, for rent, he might *pro tanto* have defeated a recovery against him by the plaintiffs, and shall he occupy a less favorable position where he acted under the sanction of the court—the more especially as the plea alleges the existence of the lien to the extent of the sum paid, at the time the attachment was levied?

3. There can be no doubt the motion by Beraujohn as stated on the motion docket, with the *memorandum* of the judge as written across it, directing the payment of one hundred and five dollars in satisfaction of his lien, was admissible evidence to show that the sheriff had legally disposed of so much of what he had collected in favor of the beneficial plaintiff. It was certainly competent for the court *mero motu*, or at the instance of either party, to have had a perfect entry made *nunc pro tunc* from the motion docket. The proceeding then was *quasi* a record, and admissible to prove the facts imported by it, though perhaps not conclusive until perfected. This view may serve to show that the third plea is not objectionable for any cause that has been pointed out by the plaintiff's counsel,

and that the evidence adduced to show that the sheriff had the warrant of the County Court for the payment of the landlord's rent was at least competent.

4. In respect to the pleas which were interposed after the plaintiff's demurrer was sustained, they are professedly pleaded "in short by consent," and the plaintiff demurs in the same form. Where this mode of pleading is resorted to by mutual consent, as the record authorises us in the present case to infer, it is not allowable for the plaintiff to object that a plea does not particularize and inform him with precision of the evidence by which the defendant intends to make out his defence. The pleas we are considering allege in general terms that the defendants performed the duties in respect of which they are charged with having committed a breach of their bond; and without pretending to determine whether in such case a general plea of performance is demurrable, we think as the plea was received "in short," the plaintiff must be held to have waived greater particularity. The demurrers to these pleas were then properly overruled.

The deputy sheriff Austin, who levied the attachment, having been released by his principal from all liability growing out of his acts, we can conceive of no objection to his competency as a witness,—none has been started here, although the question is made upon the record.

5. We are now to inquire whether it was competent for the defendants to show a mistake in endorsing the levy of the attachment, by the deputy who levied it. It is certainly a general rule that the return of a sheriff cannot be contradicted. But this rule, it is said, is not universal, and that there are many cases to be found in the books where it has been held not to apply. "Upon an attentive examination of all the cases," says Richardson, C. J., "it will be found that the rule, that there can be no averment against the sheriff's return, has only been applied in cases where the attempt was to invalidate his proceedings by showing the fallacy of his return.—This circumstance shows at once the object and reason of the rule. The object of the rule was to protect the proceedings of the sheriff, and the reason of it was the extreme inconvenience that must result from suffering the proceedings of the sheriff to be invalidated by calling in question the truth of his

return. If the sheriff's return might be thus invalidated, much mischief to parties would result from it, and much uncertainty in judicial proceedings would be the consequence."—6 Mass. Rep. 327. The limits then, within which the rule is applicable, are distinctly marked by the reason and object of it, and the rule is "that for the purpose of invalidating the sheriff's proceedings, or defeating any right acquired by means of them, the truth of his return cannot be called in question.—There is not in the books even a *dictum*, that the rule was ever carried to a greater extent than this." The learned judge adds, there is another limitation to the application of the rule that the sheriff's return cannot be traversed. The return of any collaterel fact not necessary to be returned in order to render his proceedings valid, may be traversed."—Lewis v. Blair, 1 N. Hamp. Rep. 68, and cases there cited. In that case, the action was against a deputy sheriff, and the plaintiff relied upon his return on *mesne* process, yet the defendant was permitted to show that by mistake or other cause consistent with good faith on his part, it did not state the facts truly.—See also Kittredge v. Bellows, 4 New Hamp. Rep. 424; Brown v. Davis, 9 ib. 76; Boynton v. Bladgett, ib. 224; Parker v. Guillow, 10 ib. 103.

In Watson v. Watson, 6 Conn. Rep. 334, it is admitted to be a general rule of the common law, that the return of a sheriff on an execution, except in relation to himself, when sued, is absolutely conclusive; and the reason is said to be, that he is a sworn officer to whom the law gives credit. The return of *mesne* process falls within the same reason and is governed by the rule. Yet the court refuse to recognise the English common law in this respect, as applicable in Connecticut.

As a general rule, the return of a sheriff upon returnable process is only *prima facie* evidence against *strangers*.—3 Phil. Ev. C. & H. notes 1085. Between parties to the process or their privies, it is usually conclusive, has already been conceded.—Id. 1087. And such is its effect, in general against the officer making it—Id. 1089: but the case of Lewis v. Blair, *ut supra*, shows that the rule is not universal. Another exception exists where an action is brought against an officer for not selling property levied on by him under an attachment and returned as the property of the debtor; for notwithstand-

ing such return he may show that the property was not the defendant's. Whiting v. Bradley, 2 N. Hamp. Rep. 498; Learned v. Bryant, 13 Mass. Rep. 224; The Governor use, &c. v. Gibson, et al. at this term. Nor is an officer's return conclusive against him as to statements which are mere matters of opinion. Williams v. Cheeseborough, 4 Conn. Rep. 356; Kittredge v. Bellows, 4 N. Hamp. Rep. 424; Denton v. Livingston, 9 Johns. Rep. 96.

In Boynton v. Willard, 10 Pick. Rep. 166, it is strongly intimated, that a return by an officer, that he attached certain property, is not conclusive evidence against him in trespass that he took it, so as to render him liable therefor, and preclude him as against the defendant in the writ from proving the contrary. And other cases are stated by the court in which it is supposed that his return is inconclusive against him. See Figh & Blue v. Mead, 4 Ala. Rep. 279; Clarke v. Gary, 11 Ala. Rep. 98.

In Evans v. Davis, 3 B. Monroe's Rep. 344, the general rule was admitted that a sheriff is estopped from controverting facts embraced in his return, and which were within the sphere and connected with the discharge of his duty; but it was held that a sheriff when sued as trespasser for the seizure of property under an execution, may prove facts *dehors* his return and not inconsistent therewith. In Lawson v. Main, 4 Ark. Rep. 184, it was said, the return of a sheriff is an official, ministerial act, and forms a part of the record of the court, which can neither be impeached or questioned *aliunde* by him. He will be allowed upon application to the court to amend it; but this privilege is given upon the principle that the truth of the facts ought to appear of record, and the sheriff having been mistaken in regard to them, ought to be permitted to amend his return. But he cannot be permitted to discharge himself from a liability which his unaltered return would fix upon him. So it has been said, that "nothing is better settled than that an officer making a return of his doings upon a writ is not allowed to gainsay the truth;" it was therefore held, that where a deputy of the defendant, who was sheriff, returned on a writ that he had "attached one hundred and seventy-five yards of broad-cloth, the property of the within named defendant, it was not competent for him, in an action for not pro-

ducing the property to be taken on execution, to show that but thirty yards were in fact attached by him.—Haynes v. Small, 22 Maine Rep. 14. See Price, et al. v. Cloud, 6 Ala. Rep. 254.

In Baker v. McDuffie, 23 Wend. Rep. 289, it was decided that a sheriff is generally concluded by his return upon process from gainsaying its truth collaterally; if the return be incorrect, it must be reformed by a *direct proceeding*, so that a full explanation may be given. But it was said that the return was only conclusive when set up by a party who may claim something under it; if others rely upon it as the sheriff's admission, it is but *prima facie* evidence, and may be explained. See Kendall v. White, 1 Shep. Rep. 245; Sawyer v. Curtis, 2 Ashm. Rep. 127; Mentz v. Hamman, 5 Whar. Rep. 150; also, 1 Lord Raymond's Rep. 184; Dalton's Sh'ff, 189; Wats. Sh'ff 72; Bridges v. Walford, 6 M. & S. Rep. 42.

The courts of the States have been very liberal in permitting officers to amend their returns, not only at their own instance but even after their death, on motion of their representatives; amendments have also been allowed upon the application of a purchaser or the parties.—Fowble v. Raybergh, 4 Ham. Rep. 45; Clarke v. Belmear, 1 Gill. & Johns. Rep. 443, Williams v. Rodgers, 5 Johns. Rep. 162. See 3 Phil. Ev. C. & H's notes 1095, *et seq.* In the exercise of this salutary power an officer has been permitted to amend his return of a writ, though several years had elapsed. Thatcher v. Miller, 11 Mass. Rep. 413; Rucker v. Harrison, 6 Munf. Rep. 181. See also Irvine v. Scobee, 5 Litt. Rep. 70; Boyce v. Watson 3 J. J. Marsh. Rep. 500; Woodward v. Harbin 4 Ala. Rep. 534; Gilman v. Stetson 4 Shep. Rep. 124; Planters' Bank v. Walker, 3 S. & Marsh. Rep. 409; Johnson v. Day, 17 Pick. Rep. 106; Brandon v. Snow & Cunningham, 2 Stewart's Rep. 255.

It is not a conclusive objection to the exercise of this salutary power of amendment, that a suit has been instituted against the officer, seeking to charge him upon the ground that his return subjects him to liability. Under such circumstances, it was adjudged competent to allow the return to be amended.—Hodges, et al. v. Leaird, 10 Ala. Rep. 678. It was however conceded that in such case, the court might impose terms upon the officer, and we will add that it should certain-

ly do so, where justice required it, and as the officer was at fault in not having discharged his duty with more exactness, he should indemnify the plaintiff for all costs accrued up to the time of the amendment, if the action was induced by the incorrect return.

But it has been often held, that a sheriff should not be permitted to amend his return to the prejudice of third persons; and if an amendment is allowed, it shall not affect rights which they have acquired without notice. Nor will the return of mesne process be amended after the term to which it is made, and after a judgment by default has been rendered upon the supposition that it was correct, if the effect will be to avoid the judgment.—Davidson v. Cowan, 1 Dev. Rep. 304; Means v. Osgood, 7 Greenl. Rep. 146; Bowman v. Stark, 6 N. Hamp. Rep. 459; Emerson v. Upton, 9 Pick. Rep. 167; Fairfield v. Paine, 10 Shp. Rep. 498; Hughes v. Lapice, 5 Smedes & M. Rep. 451; Berry v. Spear, 1 Shep. Rep. 187; Watkins, et al. v. Gayle, 4 Ala. Rep. 153; McGehee v. McGehee, 8 ib. 86.

If the principles we have stated and the authorities by which they are supported are well founded, it is clearly inferrable that it is within the competency of the court, to which the attachment was returned, to permit the levy endorsed to be amended, so as correctly to indicate the property levied on. And this we have seen is permissible, notwithstanding an action has been instituted upon the hypothesis that the return states the truth; but the court may as we have seen impose terms upon the sheriff, or rather so exercise its power, as not to subject the plaintiff to costs, if taking the record as it stands he would be entitled to recover. We have taken this view of the matter, that it may be seen that a sheriff who by mistake makes a false return is not remediless, and what course he should pursue to correct it and prevent injury to himself.

It must be admitted that the rule which inhibits the sheriff from falsifying his return is not definitely settled. It rests upon the arbitrary principle that it is matter of record, and so long as it remains unaltered, it cannot be gainsayed by proof. In point of moral justice it would seem to be unimportant whether the return should be first amended by permission of the court, and then adduced as evidence of the fact it imports, or whether proof should be offered to the jury to show its falsi-

ty and the truth of the matter. But the decisions are too numerous and uniform to allow the incorrectness of the return to be shewn in an indirect proceeding by a party, instituted upon the hypothesis that it is true; they strongly tend to establish that in such a proceeding the return concludes the sheriff until the amendment is regularly made. The case at bar comes directly within the influence of these adjudications, and consequently the County Court erred in admitting the evidence of the deputy sheriff, who levied the attachment, to prove that the return endorsed did not correctly state the quantity of goods levied on. We have indicated the proper course of procedure, and have but to add that the judgment is reversed, and the cause remanded.

HARRISON, Adm'r., et al., *vs.* MOCK et als.

1. Where a chancery cause is reversed and remanded by this court for further proceedings, and, upon its return to the court below, a general re-reference of the matters of account is made by the chancellor, the register is not concluded by his previous report, but may state the account anew, and rectify any mistake that may have intervened in the taking of the first account.
2. Where the trustee, in a deed for the benefit of creditors, permits the grantor until his death and his administrator afterwards to retain possession of and to make a crop with the slaves of the trust estate, the admission of the administrator, who sold the crop and received its proceeds, as to the amount of such sale, is not evidence against the trustee.
3. If the trustee, in a deed for the benefit of creditors, improperly permits the grantor in his life-time or his administrator after his death to retain possession of the slaves of the trust estate and receive the proceeds of their labor, without deriving any profit to himself therefrom, the measure of his liability is not the benefit that may have accrued to the grantor or his estate, but the value of the reasonable hire of the slaves.
4. Where a trustee, himself a creditor, accepts from the debtor a deed of trust for the benefit of all his creditors, which provides for their payment "equally and rateably, without any distinction or preference," he thereby agrees to execute the trust according to the provisions of the deed, and to share *pro rata* with the other creditors, should the trust effects prove insufficient for the satisfaction of all.

5. Where all the effects of a trust estate have been converted into money, and the debt constituting a charge upon it ascertained, the decree against the trustee, who is himself a creditor, should be for the balance that remains, after deducting the dividend to which he is entitled, and not for the entire sum found in his hands.
6. R. B. H., the trustee in a deed for the benefit of creditors, without distinction or preference, in answer to a bill filed to enforce the trust, sets up demands to a specific amount as due to him by the grantor at the time of the execution of the deed; after the death of R. B. H., the bill is revived against his administrator, who adopts the answer of his intestate, but subsequently files a supplemental answer, insisting upon an additional claim, to which he alleges his intestate's estate is entitled for money advanced and paid out by his intestate, *since* the execution of the deed and the filing of his answer, on executions against the grantor, which created a lien superior to the deed of trust: *Held*—1st. That payments on executions against the grantor, made by the trustee *before* the date of the deed, are not put in issue by the pleadings, and are properly disallowed. 2d. That the answer of the trustee is an admission of the extent of the debt claimed by him at that time, and is conclusive until amended.
7. A trustee, who, after the acceptance of the trust, in good faith, pays off executions which create a lien on the trust estate, is entitled to be reimbursed the full amount of such payments, but he cannot be allowed to avail himself of executions thus purchased to sell the trust effects.

Error to the Chancery Court of Lowndes. Tried before the Hon. Jos. W. Lesesne, chancellor.

The bill in this case was filed in June 1841 by the defendants in error, as creditors of William R. Meyer, against him, Richard B. Harrison, et al. to enforce the provisions of a deed of trust executed for the benefit of his creditors generally in April 1840 by said Meyer to the said Harrison. The deed of trust conveyed all the property both real and personal of the debtor and provided that the trustee should take it into immediate possession, expose it to sale as soon as it could be done consistently with the interest of the creditors and appropriate the proceeds to the payment of their debts "equally and ratably without any distinction or preference." Each of the defendants answered the bill, and Harrison, the trustee, insisted that one of the debts due by said Meyer at the time of the execution of the deed, and for which it was intended to provide, was a debt of about $2000, due to himself "by various notes of hand of said Meyer for money advanced, and executions paid by respondent, and judgments assigned to him which

are still due." After the execution of the deed and acceptance of the trust by him, the said Harrison caused several executions against Meyer, which he had paid for him and acquired the control of, before the date of the deed, and which created a lien on the property, to be levied on certain of the slaves assigned, viz, Aaron, Nancy and child, Hagar and Eliza, which were sold by the sheriff, and bid off by said Harrison and by him conveyed to the sole and separate use of Mrs. Meyer. The balance of the property, except the land, which was sold under judgments, having a lien older than the trust deed, and two slaves sold under a mortgage, also older than the deed, were suffered by the trustee to remain in the possession of Meyer, who cultivated with the slaves a plantation belonging to the said trustee, and received the proceeds of their labor until his death in 1842 or 1843. In the latter year the crop was sold and the proceeds received with the permission of the trustee by Richard K. Harrison the administrator of Meyer. Subsequently to the death of Meyer, Richard B. Harrison, the trustee, died, and the bill was revived first against Richard K. Harrison, and on his resignation, against Sam'l Gardner, as the administrator of Meyer, and against Kirkland Harrison as administrator of Richard B. Harrison, each of whom answered the bill, and adopted the answers of their respective intestates. In February 1845, the register, by consent of the parties, took an account of the debts due to the creditors and made report thereof to the court, the debt due to Richard B. Harrison being stated in said report at $1989 05, and in July 1845, the chancellor rendered a decree, settling the equity of the case, and referred to the register the matters of account against the estate of the trustee. The register reported the sum of $4137 68 due by the estate of the trustee, after deducting the $1989 05 due it, which report was confirmed, and the slaves, including Aaron, Nancy and child, Hagar and Eliza, the sale of which the chancellor set aside, were ordered to be sold. A writ of error was sued out to this court from the decree of the chancellor, and the case thereon reversed as to some of the matters of account and remanded for further proceedings. Upon its return to the court below, the chancellor re-referred the matters of account to the register to be reported on in accordance with the opinion of this court.

At this stage of the case, the administrator of Richard B. Harrison, by consent of the opposite party, filed what the record calls an amended and supplemental answer, in which he states, that since the execution of the trust deed and since the filing of the original answer of his intestate, his intestate advanced and paid to the plaintiffs and became thereby the owner of sundry executions against William R. Meyer—one in favor of George Walker for $302 17—two in favor of Roper, Reese & Co., one for $70 and the other for $795 77—and two in favor of George Williams, one for $288, and the other for $791, each of which executions created a lien on the trust estate superior to that of the trust deed, and that his intestate thus was, and his estate is a creditor of the said Meyer, to the aggregate amount of said executions over and above the sum claimed in the original answer, and entitled to reimbursement therefor out of the trust fund. The register in taking the account rejected this claim set up in the amended and supplemental answer, it appearing by the proof that the alleged advances or payments on the above executions by said Harrison were made in 1838 or 1839, long before the trust deed was executed. Proceeding then to state the account he charged the estate of the trustee as follows: 1st. Instead of deducting the sum of $1989 05, due the administrator's intestate, as was done in the former report, from the sum of $6126 73 with which the estate was found chargeable, he reported the last named sum with interest as due by the estate, and the first named sum as due to it and constituting a charge on the trust fund: 2d. The slaves Aaron, Nancy and child, Hagar and Eliza not having been delivered to the register in accordance with the decree, he charged their value against the estate of the trustee, to wit, $3348 with interest: 3d. He charged the estate of the trustee with the proceeds of the crop of 1843, received by Richard K. Harrison as administrator of Meyer, amounting to $1100 as admitted by said Richard K. to Samuel Gardner, and which admission was the only evidence thereof. These several sums with interest make the aggregate sum of $12,260 79. The defendants filed the following exceptions to the register's report: 1st. That he had no authority to alter his former report by changing the amount of $4137 68 therein found due, to $6126 73. 2d. That he should

not have charged the estate of the trustee with the value of the crop of 1843. 3d. That he should have credited the estate with the sum of $1989 05, the amount ascertained to be due it. 4th. That he should have allowed the additional credit claimed in the amended and supplemental answer. Each of these exceptions was overruled by the register and confirmed on appeal by the chancellor, who thereupon rendered a decree, directing the administrator of Richard B. Harrison to pay the said sum of $12,360 79 into the hands of the register in ten days after the service of a copy of the decree, and in default therein, that execution issue, &c. These several matters are now assigned as error.

J. M. Boling, for plaintiff in error:

1. The register erred in sustaining the first exception of defendants to his report by which he charged the administrator of R. B. Harrison with $6126 73 and interest from 18th July 1845, instead of $4137 68, thereby altering his report of July 1845, which had been confirmed, and when this part of the case was not refered to him. 2d. He also erred in charging the administrator of R. B. Harrison with $1100 and interest from 1st January 1844, being the amount of the cotton crop of 1843, when there was no decree against the administrator of R. B. Harrison, or against R. K. Harrison the administrator of Myer, who made and sold the crop of 1843, or any allegations to sustain one. 3d. The register erred in not allowing the administrator of R. B. Harrison a credit for the money he paid for the slaves Hagar, Aaron, Eliza, Nancy and her child, and in refusing him the further credit of $1,989 05, with interest from July 1845, the latter amount having been allowed him by a report of July term 1845, which had been confirmed. 4th. R. B. Harrison had a right and his administrator has the same, to retain his debt in preference to all other creditors.—Toller's Law of Ex'rs 295; 1 Lomax on Ex'rs 412 to 418. An executor who is a creditor of the estate, or an heir, or distributee, has the right to retain to the amount of his debt.—1 Des. 247; Pordom v. Tipton, et al. 9 Ala. Rep. 914; Fonb. Eq. b. 4, pt. 2, ch. 2, § 4, and note; Devessey v. Devessey, 3 Russ. 287, 542; 1 Eq. Dig. 498, § 13; Peter v. Beverley, 10 Peters, 532; 2 Peters' Digest, 277,

§ 30; 7 Dana's Rep. 457. 5. The chanceller erred in confirming the register's report and in overruling the exceptions of the administrator of R. B. Harrison to the same.—See authorities, *supra.* 6th. This court was in error in point of fact when this case was here before, in supposing the executions under which Hagar, Aaron, Eliza, Nancy and child were sold did not have liens older than the deed of trust—Harrison, et al. v. Mock, et al. 10 Ala. Rep. 195; and it erred in its dictum in supposing that R. B. Harrison waived his lien in accepting the trust.—Hawly v. Mancius, 7 Johns. Ch. is founded upon a statute peculiar to New York; see 2 Kent's Com. 401; N. York Revised Statutes, vol. 2, p. 36, 46. The case of Rogers v. Rogers, Hop. Ch. 523, does not sustain that position, and all the authorities sustain the position that an executor or trustee may pay off liens on the trust property and retain the amount of his payments.—See the authorities, *supra*—see also Matthews et al. v. Dragard, et al. 3 Des. 25.

T. & J. WILLIAMS, *contra.*

CHILTON, J.—When this case was before this court at a previous term, (see 10 Ala. Rep. 185) the principles which should govern its final disposition, were very fully declared, and the decree of the chancellor confirming the report of the register was reversed, and the cause remanded that further proceedings might be had in conformity with the opinion then delivered.

The effect of that reversal was to open the previous report of the register, and when the chancellor afterwards re-refered to him the matters of account, to report upon the same in conformity to the decision of this court, it was entirely proper that he should take into the account every matter properly embraced in the pleadings. It follows then, that the register was not concluded by any matter contained in the first report, and was authorised under the order of reference, which was general, and the propriety of which is not questioned by the errors assigned, to state the account anew, rectifying any mistake which had intervened in taking the first account, and charging the plaintiff in error with the proceeds of the crop of 1843, if the proof showed that such proceeds were properly

a portion of the trust effects. Goodwin, et al. v. McGehee, et al. 15 Ala. Rep. 223–251–2; Kirkman v. Vanlier, 7 Ala. Rep. 217.

As to the allowance of $1100, the price of the crop of 1843 sold, as is alleged, by the administrator of Meyer, we do not find in the record sufficient proof to sustain it. It appears that Meyer, after the execution of the trust deed, retained the slaves, and cultivated one of the plantations of Richard B. Harrison, but whether the crop of 1843 was raised on this, or other lands, does not appear. Be this as it may, the only proof of the value of the crop is made by Gardner, who states that Richard K. Harrison told him, that the proceeds of the crop of cotton made by the negroes for the year 1843, and sold by him as administrator, was eleven hundred dollars. This would be proper evidence as against Richard K. Harrison, but certainly cannot be received as sufficient to fix upon the estate of Richard B. Harrison, the trustee, a liability to that extent; as to him, it must be regarded as the declaration of a mere stranger. There is no doubt of the correctness of the proposition, that if the trust property was permitted by the trustee to remain with the administrator of Meyer, he would be as much bound to account for its reasonable profits as though Meyer himself had retained it, and the proof is sufficient to show that Richard K. Harrison administered at the request of the trustee, who was the only security upon the bond, and that the slaves were retained by his permission. The estate of the trustee, under such circumstances, should be liable for their reasonable hire, but not for the value of the crop that was raised upon the trustee's land, for this would be to charge him with the proceeds of his own estate, which would be manifestly unjust, although he may have conferred upon Meyer, or his administrator, the right to cultivate it gratuitously. There is no principle better settled than that a trustee can make no profit to himself from the trust, and if he invest the trust funds, the *cestui que trust* may elect to take the profits or hold him accountable for the fund with the interest; but if he wrongfully deliver the trust effects to a third party, and derive therefrom no profit, the measure of his liability is not the benefit which may have accrued from accidental intervening causes to such third party, but the profits which

should have accrued by the exercise of proper diligence over the effects by the trustee.

We think the register very properly reported the sum of $1989 05 as due the trustee, and as a charge upon the trust effects. The first report, which deducted this sum from the amount in the hands of the trustee, was clearly erroneous, as the effect of such deduction was to allow the trustee, whose demand was placed by the deed on the same footing with those of the other creditors, full satisfaction of his claim, whereas they must have shared *pro rata* the residue of the fund which is inadequate to the payment of all the claims. The trustee by the acceptance of the trust, agreed to execute it according to the provisions of the deed, which gave him no preference over the other creditors. But although he was not entitled to preference they have no right to enforce the collection from him of the portion which is due to him, and which the court would order to be refunded as soon as collected. This would not only be useless, but oppressive, and no reason exists why it should be done. The effects, which remained in specie, have been sold, and the decree against the administrator is for a sum *in numero*, to be paid to the register of the court for distribution. The entire amount of the debts which constitute a charge upon the fund having been ascertained, as well as the amount to be apportioned between the creditors, it is quite as practicable to determine before, as after the collection, what sum is due to each, and thus relieve the estate from paying into court money which is to be refunded.—See Nelson & Hatch v. Dunn, et al. 15 Ala. Rep.

The register very properly disallowed the claims set up by the amended and supplemental answer of Kirkland Harrison as administrator of R. B. Harrison. The proof shows the payments, which are avered in the answer to have been made since the filing of the bill, were in fact made long before the deed of trust was executed. These demands, if indeed they are different from those which are mentioned in the original answer of R. B. Harrison, are not put in issue by the pleadings. If, as the proof shows, the executions specified in the supplemental answer were paid in 1838 or 1839, the defendant while living or his representative after his death should have obtained permission to amend the answer, so as to insist

upon them. This has not been done. But they are set up as supplemental matter, occuring since the filing of the bill, and since the answer of said defendant was filed. The answer of Richard B. Harrison, which proposes to set up all the claims due from Meyer to him at the time of filing it, is conclusive upon him until it is amended, being, as was said by this court in the former opinion, "an admission of the extent of the debt at that time." 10 Ala. Rep. 195.

In respect to the right of the trustee to retain for his own debt to the full extent of his demand, as also, with regard to the lien of the executions which Richard B. Harrison had paid before the deed was executed, it is unnecessary that we should say any thing, as the former opinion is conclusive upon these points. The acceptance of the trust by him, as we have before said, is a waiver of his lien then existing, and he has no right to retain except for the proportion of the fund to which upon a just distribution of it, he would be entitled. If he has in good faith discharged liens upon the trust property since the execution of the deed, which liens existed in favor of others, as such payment would be for the benefit of the *cestuis que trust*, he would be entitled to be re-imbursed from the trust fund the full amount of such payments; but the proof fails entirely to bring him within this category. If, however, the proof was sufficient, he could not be allowed to avail himself of the executions thus purchased, to sell the trust effects. This would be to allow him to purchase for his own benefit, and to set up the interest in opposition to the trust, which a trustee may not do.—See McKinley v. Irwin, 13 Ala. Rep. 681.

For the error above noticed, the decree must be reversed so far as it requires the administrator to pay into court the amount to which he is entitled out of the funds of the estate, and as to the crop of 1843, but as to all other matters, the same is affirmed. Let the cause be remanded, that an account may be taken of the profits of the estate in the year 1843, and that the amount due the administrator being deducted, the remaining sum may be paid into court, or executions issued therefor.

Let the plaintiffs in error recover the costs of this court.

GOODMAN, Ex'R., *vs.* BENHAM, Adm'R.

1. Where, in a bill filed against the administrator with the will annexed of an estate, the complainant asserts title to the undivided interest of one of several legatees, two of whom are dead, in the absence of an allegation that the deceased legatees were free from debt, he cannot proceed without amending his bill, so as to bring in their personal representatives.
2. The chancellor may *mere motu* notice a defect of parties to a bill at the hearing, and order it to stand over on leave to amend, or dismiss it without prejudice.
3. Where the chancellor proposes to the complainant in a bill, which is defective for want of the necessary parties, to amend it, and he refuses to do so, it is not error to dismiss it.
4. Where a testator directs his executors to keep together and manage the property until the death of his widow, to distribute the annual proceeds, after supplying her wants, among the legatees, and at her death to divide the property itself among them in such way, taking into the account the advances made by himself and those that may be made by the executors, as shall render the portion of each equal, a purchaser of the interest of one of the legatees acquires only the rights of such legatee upon the final settlement, and cannot claim any other or greater interest.

Error to the Chancery Court of Lauderdale. Before the Hon. David G. Ligon, Chancellor.

The bill in this case was filed by the plaintiff in error as executor of Henry Anderson, against the defendant in error as the administrator *cum testamento annexo* of Samuel Savage, and makes the following case: Samuel Savage died in 1837, leaving a will, a copy of which is made an exhibit to the bill, by which he directs that his property, both real and personal, be kept together and managed by his executors until the death of his wife, and that the annual proceeds, after supplying her wants, be divided among his children and grandchildren; that upon the death of his wife all his property then in the hands of his executors be equally divided among his children and grandchildren, viz: one seventh part to the children of his daughter Behethalana Dillahunty, one seventh to the children of his deceased daughter Francis J. Rucker, one seventh to Samuel Savage Dillahunty, one seventh to his son Wm. F. T.

Savage, one seventh to his son George M. Savage, one seventh to his son Samuel G. Savage, and one seventh to his son John Tacitus Savage; that on the final division the advances already made to any of them, and which will be found charged in a book kept by him, that he has sealed up and committed to the custody of his wife as the evidence of such advances, are to be deducted from the portion of the child or grandchild so advanced; that his executors keep an account, in the same manner that he has done, of the several advances made by them to the several legatees up to the time of the final division; and that the portion of each, upon such division, taking the advances made by himself in his life-time and by his executors into the account, be made equal. Geo. M. Savage and others are appointed executors of this will, which was admitted to probate in the same year it bears date. Wm. F. T. Savage died before the testator, Samuel G. in April 1840, and John T. in March 1841, without issue, and the widow died in September of the last named year. In 1840, the testator of the plaintiff in error and one Hanna recovered a judgment against George M. Savage, one of the legatees, and in 1845 caused an execution, issued on it, to be levied on the interest of the said George M. in the lands of his deceased father, and at the sale the plaintiff's testator became the purchaser. In 1847, the defendant in error filed a petition in the Orphans' Court for a sale of the lands of the testator, Samuel Savage, for the purpose of a more equal distribution among the legatees, to which the plaintiff in error withdrew all opposition, in consideration of a written agreement by the defendant that he would retain in his hands one fourth of the proceeds of sale subject to the decision of the Court of Chancery in the present suit, which is instituted to obtain a decree therefor. The answer admits all the material allegations of the bill, but insists that Geo. M. Savage, who qualified as executor under the will of his father, as such executor received large sums of money as assets of the estate, and had made no settlement; that he had received his share of the personalty, and that the estate is yet unsettled, &c.

The chancellor dismissed the bill for want of equity and a defect of parties, having first given the plaintiff an opportunity to obviate the latter objection by an amendment of the bill,

which he refused to embrace. The decree of the chancellor is now assigned as error.

L. P. WALKER, for plaintiff in error:

1. The judgment of complainant was obtained in October 1840, and operates a lien upon the real estate of the defendant from that time. 3 Ala. Rep. 560; 4 ib. 543.

2. Upon the death of the other legatees named in the bill, George M. Savage became invested with a title to one fourth part of the whole estate, real and personal. As to the real estate, he was with the other heirs a tenant in common, and the interest of each of them was subject to levy and sale. 3 Stew. & Port. 251; 2 U. S. Dig. 328, §§ 324, 321—329, § 341; 14 Mass. 20; 15 Mass. 439; 7 Ala. Rep. 115.

3. As a replication is on file, and the cause was not heard on bill and answer alone by consent, nothing that is stated in the answer by way of avoidance can be considered as true, unless proved. The answer denies none of the facts upon which the equity is based, but sets up new matter, none of which is proved, and that portion of it which is admitted by the agreement does not affect our rights: For in contemplation of law, the judgment, levy and sale are all one act; and it was not in the power of Geo. M. Savage alone, or of him with third persons, by any fraud, conveyance or other act, to defeat or impair the lien of the judgment upon his interest in the real estate of his father.

4. The date and language of the agreement between Benham and complainant's counsel show that it was made before the decree of the Orphans' Court, and that their objections were not overruled, but withdrawn. But even if this were so, it would not affect complainant, as it is clear that until the personal estate was exhausted, the title cast by law upon the heirs, as regards the real estate, was not divested. And as Anderson purchased G. M. Savage's interest, he occupies his place, in so far as his right to contest was concerned.

5. It was not necessary to make the other legatees parties, for the money in controversy is *assets* in the hands of the administrator, and where the proceeding is against *assets*, the administrator is the only necessary party.

6. The bill is based upon the agreement between Goodman

and Benham. It is a personal obligation on the part of Benham, and no other persons need have been made parties; and this was upon good consideration—he undertook to pay the money in his individual character.

7. This is the only court where Goodman could obtain redress.—1st. He could not sue for the land, because it had been sold by his assent, and the purchaser at such sale took a good title. 2d. He could not sue for the money on the agreement, because by it the remedy was to be in this court, and the rights of the parties were to be fixed in this court.

8. If the title acquired by the purchase at sheriff's sale is divested by the proceedings in the Orphans' Court, the purchaser is substituted to the claims of the devisee and legatee and is entitled to be reimbursed out of the personalty. Any other course would enable an administrator, by applying for sales of land instead of personalty, to defeat creditors and purchasers.

9. Personalty is first liable to pay debts; and if the land has been taken for this purpose, the owner of the land or party having a claim to the land is entitled to be paid out of the personalty.

10. If the testator and George Savage had been tenants in common of these lands, George Savage having the precise interest that he held under the will, and this had been purchased under judgment and execution, and an agreement had been made between the purchaser and the administrator, like the one made in this case, Benham would be the only proper party, and the facts of this case do not change the rule.

11. The insolvency of the sureties on the bond cannot change the rights of the parties. The other devisees may have been negligent, and thus have lost their equities, and this is not negatived by their answer, and they have their remedy over against the judge of the Orphans' Court for not having required additional security.

Ormond, for defendant:

1. The will is the law of the case, and from that it is clearly obvious the testator intended his children should be equally interested,—see in particular the 3d and 5th clauses, requiring an account to be taken of advances, &c. Yet the bill is filed

upon the supposition that G. M. Savage has under the will an interest in the land, no matter what may be the state of the accounts, and claims in virtue of the sale one fourth part of the proceeds.

2. In this State, land does not descend to the heir at law or devisee unconditionally, but only *sub modo*. The administrator has the right to enter upon the land and rent it out, or to apply to the Orphans' Court for an order of sale to pay debts or make more equal distribution. It results necessarily that an unconditional legal title does not pass to the heir or devisee, and therefore cannot be sold under execution at law. I think it is a self-evident proposition that the sheriff cannot sell that which he cannot give possession of, or by his conveyance authorise the purchaser to recover at law. This precise point is decided in Rabb v. Aikin, 2 McCord's Ch. 118.

3. If it were conceded that by the purchase the execution creditor was substituted to the rights of the devisee under the will, he could only insist on standing in his shoes after a settlement of the estate.—Childress v. Childress, 3 Ala. 752; Duffee v. Buchanan, 8 ib. 27; Brown v. Lang, 14 ib. 721. But that is not the purpose or prayer of the bill, nor has it any allegation adapted to such relief. The whole gravamen of the bill is the supposed right acquired by the purchase to one fourth the proceeds of the sale of the land, without regard to the actual interest of the devisee under the will upon a settlement of the estate. (5 Port. 26, as to the relief in such a case.) See the admission of the complainant on page 21 of the record, that G. M. Savage has received his portion of the personalty, and has not accounted as executor.

4. The bill is fatally defective in not making the representatives of the three deceased brothers parties.

COLLIER, C. J.—The consent of the plaintiff and defendant, contained in their written agreement, that the rights of the plaintiff resulting from the purchase of his testator at the execution sale against George M. Savage might be settled in the Court of Chancery, cannot impart jurisdiction to that court if its jurisdiction be otherwise indefensible. But we will not stop to consider this question, as the case may be disposed of upon another ground, and the controversy most probably closed.

It will be observed upon a reference to the will of the defendant's testator, and it is also shown by the allegations of the bill, that the testator directed all his estate, real and personal, in the hands of his executors, upon the death of his wife to be equally divided between his "children." The allotments to the beneficiaries and the legatees are thus particularized, viz: one seventh part to the children of Behethalona Dillahunty (testator's daughter) or the survivor of them in equal proportions; one seventh part to the children of his deceased daughter Frances J. Rucker, or the survivor of them (upon certain conditions not material to be noticed); one seventh part to Samuel Savage Dillahunty (upon certain conditions not material to the present case); one seventh to his son Wm. F. T. Savage; one seventh to his son George M. Savage; one seventh to his son Samuel G. Savage; one seventh to his son John Tacitus Savage.

The bill alleges that Wm. F. T. Savage was dead at the time the will was made; that Samuel G. died in April 1840, and John T. in March 1841—neither of whom left any issue or made a will: thus leaving four only of the legatees between whom the estate was to be divided. It appears that the will was admitted to probate in 1837, and that the testator's widow died in September 1841, long previous to the purchase of the interest of Geo. M. Savage by the plaintiff's testator.

In respect to the legacy to Wm. F. T. S., looking to the will alone, it must be considered as having lapsed by his death previous to the will being executed, and consequently remained a part of the testator's estate, to be distributed and divided either according to the directions of his will or as in case of intestacy. As to this portion of the testator's estate, it may be considered as committed to the defendant to be disposed of according to law; and he is the only party necessary to defend a suit which may affect it.

The other two sons who have died since their father were entitled at the time of their respective deaths to the provisions made for them by the will, at least as to the personalty, although they could not have have been let into the enjoyment of their portions until the death of their mother—their legacies were thus far vested, though to be set apart to them *in futuro*. It does not appear that these legatees were not indebted at the

time of their death; and this intendment cannot be made in favor of the complainant, conceding that it would be sufficient to relieve him from the necessity of bringing their representatives before the court. Besides, it is not proper that the settlement of their estates should be made by administrators specially representing them; and can such a mode of adjustment be dispensed with, and their next of kin be let in to the enjoyment of their estates, although there were no debts to be paid or collected? However this question may be answered, we think that in the absence of an allegation that the deceased legatees were free from debt, the plaintiff cannot proceed upon the case he has stated, without amending his bill, so as to bring in their personal and perhaps real representatives. Such a modification of the bill is required by the familiar rule which declares all parties in interest to be made parties to a suit in equity. This rule, it is true, has its exceptions, but none which will justify the want of such essential parties, at least under the circumstances of this case. Marr v. McCullough, 6 Port. Rep. 507.

It is not in dispensable to the action of the court that the want of parties should be presented by a demurrer; it is allowable for the chancellor to notice it *mere motu*, even at the hearing, and order the bill to stand over on leave to amend or to dismiss it without prejudice.

In the present case the chancellor proposed to the complainant to amend his bill, and he refused to do so. It was then entirely competent to have dismissed it. The fact that the decree does not direct the dismissal to be without prejudice is wholly immaterial; for if the plaintiff can make out a case against other parties in connection with the defendant, it cannot be pleaded in bar of a new suit. If it could in any case, it will not avail here, for the decree places the dismissal upon the grounds of a want of equity and defect of parties.

We might here close this opinion, but as it may be more agreeable to the parties to look farther into the case, and state some principle which may determine the propriety of ulterior proceedings, we think it best to do so.

Without attempting to recapitulate the several provisions of the will upon the subject, it is enough to say in general terms, that it indicates throughout a disposition to dispense favors

with great equality—a desire by the testator to deal justly with his children, and the descendants of such of them as were dead. So particular had the testator been in making advancements to his children, that he estimated the value of what he had given each of them, and noted it in a book, which by his will he declares he had sealed up and delivered to his wife, with directions to preserve it. This book he affirms shall be evidence of what it contains, and shall be refered to in equalizing the portions of the legatees. The executors were to observe the same particularity, so that when the final division was made, the shares of the beneficiaries could be proportioned with exactness, taking into the account what had been advanced both by the testator and his executor.

George M. Savage (whose interest in the real estate of the defendant's testator the plaintiff claims under a purchase by his testator at an execution sale in 1845,) qualified as executor in December 1837, and continued such up to Nov. 1842, when his authority was revoked. It is alleged by the answer that he wasted the estate to a large amount.

Conceding that the legatees named in the will of the defendant's testator had such an interest in the lands devised as could be sold under an execution against them, and still it is clear that the purchaser would be substituted to the rights of the devisee and entitled to nothing more. He could not resist a sale under a decree of the Orphans' Court for a cause, which would not avail the devisee; nor could he claim any other or greater interest in the proceeds. In all respects his rights would seem to be identical.

If G. M. S. while executor received the share to which he was entitled under his father's will, he should receive nothing upon the final division; and if he received more than his due proportion of the personalty, his interest in the lands should be so applied, if necessary, as to reimburse the excess. This is necessary to subserve the intention of the testator, is demanded by the principles of natural justice, and is the dictate of an enlightened equity.—See Childress v. Childress, 3 Ala. Rep. 752; Duffee v. Buchanan, 8 ib. 27; Brown v. Lang, 14 ib. 721. The equity which would subject the executor's interest to the reimbursement of the waste or misapplication of the assets attached previous to the judgment and execution

under which the plaintiff deduces title. We do not however intend to intimate that this is important, but only to show that in a moral point of view, the right of the other legatees is strengthened by the removal of the executor and the conversion of the assets by him, before his interest was purchased by the plaintiff's testator.

We might have rested our opinion exclusively upon the ground that G. M. S. was obliged to account to his co-legatees for the abuse of his trust, before he should be allowed to receive from his father's estate one-seventh of the entire amount of it. But the answer which brings his malversation to our view is in avoidance of, and not responsive to the bill, and does not in express terms allege that the assets converted exceded in value one-fourth the interest in the lands of the testator. No proof has been taken to sustain the answer, and the admission of the complainant that a part of it is true does not furnish evidence necessary to have enabled the court of chancery to render a definitive decree in favor of the complainant upon the defence set up.

If the facts supposed had been proved, the case stated in the bill would have been fully met, but in the condition of the record, we can only affirm the decree for the failure of the complainant to bring all the essential parties before the court.

BLACKMON *vs.* BLACKMON ET ALS.

1. An antenuptial agreement, by which the intended wife, in consideration of the settlement of her own estate to her sole and separate use, releases and relinquishes to her expected husband all claim to dower in the lands of which he may be seized during the coverture, is not a bar to a proceeding at law, after his death, for an allotment of her dower.

Error to the Circuit Court of Wilcox. Tried before the Hon. Nathan Cook.

W. F. GEE, for plaintiff:

1. At common law an ante-nuptial contract could not be

set up in bar of dower—Bac. Ab. Tit. Jointure; 2 Ala. 83; but the statute of 27th of Henry VIII, commonly called the statute of uses, altered the common law in this respect. By a chapter in that statute, it was provided that where jointures were settled in lieu of dower, possessing certain requisites prescribed by the statute, the claim of dower should be thereby barred, but the chapter in the statute which relates to jointures never was of force in this State, and the common law in this respect is unaltered.—Gould, ex'r, v. Womack and wife, 2 Ala. 83.

2. But if the chapter in the statute of uses which relates to jointures was of force in this State, these pleas would be bad under the statute. By that statute, a competent provision settled in lieu of dower could alone operate a bar of the right. Neither of these pleas avers that any settlement was made in lieu of dower; they only assert that an agreement under seal was entered into by the parties to it, by which the petitioner covenanted that the estate of the deceased should be free and exempt from all claim of dower, in case she survived him, and the deceased covenanted on his part, that the petitioner should hold to her own separate use all property she then owned, or might afterwards acquire; but no allegation or averment is made in either of the pleas, that she owned any property at the time the agreement was made, nor is there any allegation that she subsequently acquired any. For the court therefore to suppose that she held any property secured by the terms of the agreement, would be to aid the pleas, by infering the existence of facts no where asserted by them, and would be directly opposed to the fixed and settled rule, that in pleading the construction shall be uniformly most strong against the party pleading.

SELLERS, *contra.*

PARSONS, J.—The plaintiff in error as the widow of Thomas Blackmon, deceased, filed her petition in the Circuit Court of Wilcox, against the heirs and representative of her late husband, to recover her dower in certain parcels of land. The petition alleges the seizin of her husband during the marriage, and that after the marriage he conveyed by his deed the same land to his three sons, who are the defendants in er-

ror, as joint tenants in fee simple, and that the three sons accordingly went into possession of the lands.

The defendants in error (the three sons) filed their three several pleas to the petition. There is no question of law, however, as to the first. The second plea alleges an antenuptial covenant and agreement under seal, between the petitioner and her late husband in contemplation of their marriage, whereby he was to enjoy all his then present and future estate free from the claim of the petitioner by way of dower, or otherwise, in case she should survive him, and she was to have and hold to her own separate use all her then present and future estate, together with the rents, &c. of the same, to be controlled &c. as she might think proper. This plea further alleges that she has ever since had and still has her estate, &c. according to the deed.

The third plea alleges that the petitioner, while she was sole and unmarried, covenanted with her late husband, that in the event of their marriage, and in consideration that he then and there covenanted with her that she should, notwithstanding said marriage, have and hold &c. to her sole and separate use, all her then present and future estate, together with the rents, &c. of the same, then and in consideration thereof, released and relinquished all claim &c. that might accrue to her by said marriage, in case she should survive him, by way of dower, or otherwise, to his then present or future estate. The plea further alleges that said Thomas did then and there enter into covenants with the petitioner, to the effect aforesaid, that she accepted the same, and has ever since held, &c. her own estate, with the rents &c. to her sole and separate use.

To the second and third pleas there were demurrers, which were overruled by the court, and this is assigned as error. If for the purpose of avoiding circuity of action, we could hold that the agreement stated in the second plea amounted on the part of the petitioner to a release of dower, then the second and third pleas would be the same in effect. As the third plea however alleges a release, we will confine our remarks chiefly to it, for if it cannot be sustained, the second plea must fall of course. In Gould, executor of Hays, v. Womack and wife, 2 Al. 83, the court observed: "At common law, by the marriage, the wife acquired a right to be endowed of one-

third part of her husband's lands. This right she could not alien or dispose of, in consequence of two maxims of the common law: 1st—that no right can be barred before it accrues; 2d—that no right or title to an estate of freehold can be barred by a collateral satisfaction."

The matters alleged in the 2d plea are clearly within the 2d of these maxims, unless those matters can have the effect of a release of her dower. If they can have that effect, then they and the third plea stand on the same ground, and are subject to the first of the maxims, "that no right can be barred before it accrues." It may be said, however, that the question whether a woman can, before marriage, *release* her claim to dower in the lands of her intended husband, did not arise in the case cited. But we find by other authorities that it is a correct principle, and that it applies to such a claim.—Bac. Ab. title Jointure. In Hastings v. Dickinson and wife, 7 Mass. Rep. 153, the case was that the widow of one Thomas Hastings brought her writ of dower, and it appeared that previous to her marriage with her deceased husband, a marriage settlement was executed by them and one Watson, as trustee, in which she covenanted with her intended husband, his heirs, &c. in consideration, &c. never to claim any right of dower, &c. in the estate of which he might die seized and possessed. It was remarked by Chief Justice Parsons, "that it was well known that at common law, a jointure made to a wife, before or after marriage, was no bar to her dower; because the dower being a freehold estate could not be barred by any collateral satisfaction," citing Coke Lit. 36, b.; 4 Coke 1. The Chief Justice next considered the second question in the cause, viz, whether her covenant never to claim dower could have the effect of a release. Upon this he said, "it is true that a covenant never to prosecute an existing demand shall operate as a release, to avoid circuity of action. But a release of a future demand, not then in existence, is void. Now in this case, the settlement being executed before the marriage, the demand of dower had no existence, the same not being inchoate." And then he stated that if there be any relief against the widow on her covenant, it must be by action. There are other cases which support the doctrine of the case last cited, and they show besides, that neither the widow's

covenant, nor her release of dower before marriage, can estop her. The doctrine of estoppels is not applicable.—Gibson v. Gibson and others, 15 Mass. 106; Croade v. Ingraham, et al. 13 Pick. 33; Vance v. Vance, 8 Shep. Rep. 364.

At present we decide nothing as to the effect which the matters stated in the second and third pleas might have in equity. We only decide that as a bar to her claim of dower in a proceeding at law, they are unavailing. The demurrers to those pleas should have been sustained; and for the error in this respect the judgment must be reversed, and the cause remanded.

GEE *vs.* THE ALA. LIFE INS. & TRUST CO.

1. S. H. G. and C. J. G., in exchange for the bonds, payable at a future day, of The Ala. L. Ins. & Tr. Co.—a corporation whose charter does not authorise it to lend its credits—executed to the company their individual bond, secured by mortgage, which they afterwards took up by transfering to the company the notes of E. given to them for land. E., before the transfer of his notes, had made a payment on one of them, which S. H. G. and C. J. G. neglected to enter, and in consideration thereof, they gave him their note for the amount of the payment, which he transfered to the company in part discharge of his notes, and which was subsequently taken up by S. H. G.'s substitution of his own note therefor, payable to the company: *Held*—That the note of S. H. G. is not vitiated by the invalidity of the original contract between him and C. J G. and the company, but is founded on a sufficient consideration.

Error to the County Court of Wilcox. Tried before the Hon. D. W. Sterrett.

W. F. GEE for the plaintiff in error, submitted the case on the authority of Smith v. The Ala. Life Ins. & Trust Company, 4 Ala. 558.

No counsel for the defendant.

CHILTON, J.—This was an action of assumpsit, brought by the defendant in error against Sterling H. Gee, the plain-

tiff in error, to recover the amount of a promissory note, executed by him and Charles J. Gee for the sum of two thousand dollars, payable to the said Alabama Life Insurance & Trust Company, dated the 5th of April 1845, due sixty days thereafter and payable and negotiable at the Bank of Mobile. Pleas: 1, non assumpsit; 2, that the note sued on had been executed in consideration and liquidation of a bond, and mortgage for the security of said bond on certain real estate, specifically named in the plea, said bond being for the sum of ten thousand dollars, payable to said company, in annual instalments of two thousand dollars each, the first due the 19th March 1845, and providing for the payment of interest semi-annually at the rate of eight per cent per annum, with the current rate of exchange, &c: That the consideration of said bond and mortgage was the bonds of the said Alabama Life Insurance & Trust Company, payable at ten years, or at some future day in the city of New York, with semi-annual payments of interest at the rate of six per centum per annum, upon the delivery of *coupons* attached to said bond, &c.

This plea was demurred to by the plaintiff, but the demurrer was overruled by the court, and issue was thereupon taken—verdict and judgment for the plaintiff for $2409 99.

Upon the trial, a bill of exceptions was sealed, by which it appears that on the 19th March 1839, C. J. Gee executed to the plaintiff below his bond and mortgage, the consideration of which was the bond of the company. For the payment of this bond C. J. & S. H. Gee afterwards transfered to the company the notes of one B. C. Edmunds, which Edmunds had given them in consideration of the sale of land, and Edmunds subsequently transfered to the company the note of C. J. & S. H. Gee, given by them to him for money, which he, Edmunds, had paid to them on one of the notes transfered by them to the company before the transfer, but which they had failed to credit on the note of Edmunds when they so transfered it. The note in suit was given by the plaintiff in error to the company in lieu of the last named note of C. J. & S. H. Gee, which had been transfered to the company by Edmunds. The mortgage and bond made by Gee were cancelled by the substitution of the note of Edmunds, which was secured by a mortgage upon the same lands previously mortgaged to the

company by Gee. The first mortgage it appears was cancelled the 11th May 1844. Upon this state of facts, the defendant requested the court to charge the jury—1. "If they were satisfied from the testimony that C. J. Gee executed a bond and mortgage on the 19th day of March 1839, the consideration of which was the bonds of the company to pay money at a future day, and after the execution of said bond and mortgage, C. J. Gee transfered to the company securities for the payment of the money on Benjamin C. Edmunds in payment of said bond and mortgage, and on the same consideration on which said Gee had executed said bond, &c., that then the contract of transfer and assignment between C. J. Gee and the company for the securities on Edmunds was without any consideration received by Gee from the company and invalid." 2. "If the jury are satisfied from the testimony that C. J. Gee executed a bond and mortgage on the 19th March 1839, the consideration of which was the bonds of the company to pay money at a future day, and that afterwards C. J. Gee transfered to the company securities for the payment of money on B. C. Edmunds, and if Edmunds before such transfer had made payments to Gee on the securities so assigned, which were not credited on said notes, and that Edmunds not insisting on the payment which he had, previous to the assignment, made to Gee, as against the company, had agreed to pay the latter the entire amount of his notes, and Gee, in consideration of Edmunds' promise to the company to pay the money a second time, undertook either to Edmunds or to the company to pay the note sued on, that then Gee's promise is without consideration."

These charges the court refused to give, and this refusal is now assigned for error in this court.

The effort of the counsel in the court below was doubtless to shape his defence so as to bring it within the influence of the principles settled by this court in the case of Smith v. The Alabama Life Insurance & Trust Company, 4 Ala. Rep. 558, upon the authority of which case he now submits the cause without argument. In that case the company had filed a bill to foreclose a mortgage given by Smith upon certain real estate to secure the payment of a bond executed by him to the company, payable by instalments, &c., the consideration of

which was the bonds of the company, payable at a future day, bearing six per cent interest. The question was raised as to the power of the company, under its charter, to make the negotiation, and it was held, that it could not *lend its credit*, by making bonds to fall due in future, and exchange such bonds for the bond of an individual for the same amount; but that the bond so taken was void, and the mortgage being but an incident to the debt of course fell with it.

It is, however, quite a mistake to suppose the case at bar falls within the same category. If the company were seeking to enforce the collection of the bond or the foreclosure of the mortgage, executed to it by Gee on the 19th March 1839, then the principle in the case cited would apply, but so far from this being true, that bond and mortgage have been fully satisfied and cancelled—paid by the transfer on the part of Gee of notes or securities for money on Edmunds. Here the defence sought now to be made ceased, for it is very clear that Edmunds, if sued by the company on his notes, could not have set up the defence that these notes were acquired by the company in satisfaction of a bond and mortgage, purchased by it in exchange for its own bonds in contravention of its charter. He was an entire stranger to this arrangement, having no concern whatever with it, and consequently could take no advantage of it. Conceding that Gee could have insisted on the invalidity of his contract with the company—he did not choose to do so, but affirming the validity of his bond and mortgage, paid and cancelled them by the notes of Edmunds. The latter can take no advantage of a right which Gee has waived.—Brown v. Lipscomb, 9 Porter's Rep. 472; Foster v. Goree, 5 Ala. Rep. 424; Garey v. Colgin, 11 ib. 519; Herbert v. Hanrick, at the present term.

The first charge assumes that the transfer by Gee to the company of the notes on Edmunds in payment of the bonds of Gee, was without consideration and invalid. This cannot be sustained as a legal proposition. Conceding, as we have before stated, that the bond of Gee and the mortgage given for its security could not have been enforced by the company, still there was a strong moral obligation existing on the part of Gee, to pay the debt. He had received the bonds of the company, which were valuable to him, perhaps were but little be-

low par, and having paid his or note or bond, given in exchange for them by the notes of Edmunds, no principle of law would tolerate his recovering back what he had paid, either in a suit for that purpose, or as a set-off, when sued by the company upon a demand not dependent upon the unauthorised act of the company for its consideration. The note in suit was not given for the bonds of the company, nor is it dependent upon the original transaction for its consideration. It was given to the company in lieu of a note payable to Edmunds, and which he had transfered to the company, the consideration of which note was for money paid by Edmunds to Gee, and which the latter thus undertook to refund. The same principle which would forbid that Edmunds, if sued upon the note given by him to Gee, and transfered to the company, should take advantage of the want of consideration as between Gee and the company, equally applies to the suit of the company against Gee on the note payable to Edmunds, or on the note in suit given in lieu of that. It does not lie with Gee to say that Edmunds has transfered his note to the company without consideration, much less should he be allowed to set up such defence after he has taken up the note from the company, thereby recognizing the validity of the transfer by the execution of a new note, payable directly to the company. But we repeat, if this note could be so connected with the original transaction between the company and Gee, as to depend upon it for its consideration, as Gee in the bonds of the company received something valuable, he was placed under a moral obligation to pay, and this obligation furnishes a good consideration to support the express promise now declared on.—See Glass v. Beach, 5 Verm. Rep. 173; Turner v. Patridge, 3 Penn. Rep. 172; Barlow v. Smith 4 Verm. Rep. 144; Clarke v. Herring, 5 Binn. Rep. 33, and authorities cited; 1 U. S. Digest, 103, § 122. See also, Dearing v. Moffitt, 6 Ala. Rep. 776; Windham, use, &c. v. Childress & Skanes, 7 Ala. Rep. 357.

The ruling of the County Court being in conformity with the views above expressed, the judgment is affirmed.

FORREST & LYON *vs.* CAMP.

1. The judgment of a court of record in this State for costs, under the act of 1812, (Clay's Dig. 205,) creates a lien on the lands of the defendant from the date of its rendition.
2. An irregularity in the entry of the levy on an execution cannot affect the title of the purchaser, and as evidence intended to explain it is immaterial and unnecessary, its admission, though erroneous, cannot avail as a ground of reversal.
3. Fraud pollutes public as well as private sales, and in an action of trespass to try titles, between parties claiming by purchase under execution against the same defendant, it is error to exclude evidence tending to show that the deed of the sheriff, upon which the plaintiff relies, was fraudulently obtained, and was intended to delay and hinder creditors.

Error to the Circuit Court of Jefferson. Tried before the Hon. Geo. D. Shortridge.

This was an action of trespass to try title to a lot and improvements in the town of Elyton, and was instituted by the defendant against the plaintiffs in error. The plaintiff below rested his title on a judgment for costs, rendered against one Jonathan Steele, on the 4th February 1840, in the County Court of Jefferson, an execution thereon, and a sale under it on the first Monday in June 1840, a deed from the sheriff to Jonathan B. Badger and Sylvester Steele, the purchasers at said sale, and a deed from them to him. The entry of the levy on the execution, not describing the premises accurately, the plaintiff introduced the sheriff as a witness and proved by him that the property levied on and intended by the description in the entry on the execution was the lot and improvements in controversy. To this evidence the defendants objected, but their objection was overruled by the court. The defendants relied upon the deed of the Marshal of the United States for the Middle District of Alabama, founded on a sale by him subsequently to the purchase by Badger and Sylvester Steele, under a judgment and execution against the said Jonathan Steele, and offered to prove that the purchase of the premises by Badger and Sylvester Steele was procured for the

purpose and with the intent to delay, hinder and defraud the creditors of Jonathan Steele, and that the deed from Badger and Sylvester Steele to the plaintiff was without consideration and voluntary, but the plaintiff objected to the testimony and the court sustained the objection. The defendants also, to show an outstanding title to the premises, gave in evidence a deed from said Jonathan Steele to one Flannagin, dated the 29th April 1840, by which the premises were conveyed in trust for the benefit of creditors. The defendants asked the court to charge the jury: 1st. That the said judgment for costs, under which the plaintiff claimed, did not create a lien on the real estate of Jonathan Steele, the defendant therein.—2d. That if such judgment did create a lien, the lien could not attach until the costs were taxed, or the execution issued:—Both of which charges the court refused to give, but charged that the judgment created a lien from the date of its rendition. To the rulings of the court, to the refusal to charge as asked, and to the charge given, the defendants excepted and now assign them severally as error.

PECK, for plaintiffs in error:

1. It was incompetent to vary or explain the return of the sheriff on the execution by parol evidence. Clark v. Gary, 11 Ala. Rep. 98; Craft v. Dexter, 8 ib. 767; Mead et al. v. Figh & Blue, 4 ib. 279.

2. Sylvester Steele, being the grantor of Badger, was incompetent to prove the execution of the deed to Badger and from Badger to defendant. Although there is no actual covenant in the deed to Badger, nevertheless our statute makes the words grant, bargain and sell to operate as an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, &c. Clay's Dig. 156, § 31; Roebuck v. Dupuy, 2 Ala. Rep. 539; 1 Greenl. Ev. § 397, and note.

3. The evidence offered by plaintiff in error to prove that the purchase of the premises at the sheriff's sale by the said Sylvester Steele was made and procured for the purpose and with the intent to delay, hinder and defraud the creditors of Jonathan Steele, should have been admitted. A sheriff's sale is within the statute of frauds.—Jackson v. Catlin, 2 Johns.

Rep. 259; Ennis v. Waller, 3 Blackf. 472. A sale of lands under an execution, if the purchase is made for the purpose of hindering, delaying or defrauding creditors, is void as to all subsequent purchasers and prior creditors.—Duncan et ux v. Forsythe, 3 Dana, 229–231; Carter v. Castleberry, 5 Ala. Rep. 277–279.

4. So should the evidence have been admitted which was offered to prove that the deed from Badger to the defendant in error was made without consideration, and that the defendant purchased with a full knowledge of all the circumstances. The evidence offered and rejected would have shown that defendant was not a *bona fide* purchaser, but that his purchase was a mere collusion to defraud the plaintiffs in error.

5. A judgment for costs only *against a plaintiff* is no lien upon land; therefore, the charge given that it was is erroneous. We have no statute that directly declares a judgment, of any kind, a lien upon land. The lien, where it exists, is derived from the act that gives the writ *elegit*.—Burks' adm'r. v. Jones & Allen, 13 Ala. Rep. 170-1. An extent under our statute can only be made to pay the debt and damages.—See the Writ of Elegit and Return, Clay's Dig. 200-1. At the common law, there were no costs, but if the *plaintiff* did not prevail, he was *amerced for his false clamor.* The statute of Gloucester 6, Ed. I., first gave the *plaintiff* costs in certain cases.—Bac. Ab. vol. 2, a, 33. The costs, however, were *included in and recovered as a part of the damages;* and consequently, where there were no damages there could be no costs. Robert Pilford's case, 10 Coke 116; Phillips v. Bacon, 9 East. 298, 303.

Earnest, for defendant:

There is no error in the record. In this case there are two prominent points, and upon them hang the decision of the cause:

1st. Is the judgment of Byars v. Steele such a judgment as binds real estate? The affirmative of this proposition is, I think, clearly settled by our statute.—See Clay's Dig. 199, § 1; ib. 205, § 17. The language is, all judgments and decrees, &c.—Morris v. Ellis, 4 Ala. Rep. 560.

2. Can a creditor of the defendant in execution contest a

sheriff's deed for fraud or irregularity? The negative of this is clearly settled, I think, in the case of Mobile Cotton Press Co. v. Moore & Magee, 9 Port. 679. On page 692, the court uses this language: "That a sale of land will be set aside (by motion to the court to which the execution is returnable) where the sheriff is guilty, &c., to the prejudice of either party or a third person." By third person is clearly meant a creditor; and if he neglects to apply to the proper forum and by the proper motion, he is as much estopped as the defendant in execution from alleging fraud. This decision and the construction here given is confirmed and approved by the train of subsequent decisions of this court.—See Ware v. Bradford, 2 Ala. Rep. 682; Hurbert v. McCollum.

DARGAN, C. J.—It is contended by the plaintiffs in error, that a judgment for cost alone, rendered in favor of a defendant against the plaintiff, does not create a lien on the land of the party against whom it is rendered. This question involves the construction of our statutes, subjecting land to the payment of judgments; for at common law the lands of a debtor could not be sold or in any manner made liable to the payment of debts. By the act of 1807, (Clay's Digest 199,) it is enacted, "that all persons, who shall recover any debt, damages or cost by the judgment of any court of record within this State, may at their election prosecute writs of *fieri facias*, *elegit*, or *capias ad satisfaciendum*, within the year, for taking the goods, lands, or body of the person or persons against whom such judgment is obtained." It is however contended, that a judgment for cost alone cannot create a lien on the land of the party against whom it is rendered, because this statute gives no other process against land, except the writ of *elegit*, the form of which is prescribed by the act, and allows the lands of the defendant to be extended for the debt and damages only, *but not for costs, eo nomine.* Besides, that under our practice, the plaintiff or the successful party is not entitled to receive the costs, as it is due to the officers of court and to the witnesses summoned in the cause, unless it is made to appear that he has actually paid such costs to those entitled to receive them; therefore, it could not have been the intention of the Legislature to put the plaintiff in possession of the land of the defend-

ant, under this process, to be held by him until the costs were paid or received from the rents and profits, as he might not be entitled to retain the costs thus realized.

I do not deem it necessary to determine whether a judgment for costs alone would create a lien on land, under the act of 1807, for it is very clear to my mind, that by the act of 1812 (Clay's Dig. 205) all judgments and decrees of courts of record in this State create a lien on the lands of the party against whom they are rendered. The language of the act is, "Hereafter lands, tenements, and hereditaments shall be subject to the payment of all judgments or decrees of any court of record within this State, and the clerk of such court shall frame the execution accordingly," &c. I know that our courts have usually ascribed the lien on land created by judgments of record to the act of 1807, which merely gives the writ of *elegit*, by which the lands of the debtor may be extended.—Morris v. Ellis, 3 Ala. 560; Campbell v. Spence, 4 ib. 543; Burke v. Jones et al. 13 ib. 167. But whether the act of 1812 does create a lien in favor of judgments, independent of the act of 1807, has never been determined by this court, so far as I have been able to discover, and the question for the first time is presented for adjudication.

The act of 1807 does not in express words give to judgments the effect of creating a lien on land. It merely gives the judgment creditor the right to sue out the writ of *elegit*, by which a moiety of the lands of which the defendant was seized at the time of the rendition of the judgment is liable to be extended in satisfaction of the judgment. This right has been construed into a lien on the land.—Morris v. Ellis, 3 Ala. 543. If the right to extend the land in satisfaction of the judgment is correctly construed as a lien upon it, I ask, why deny the lien to the right to sell absolutely? We perceive no reason why we should hold that a lien is created by one statute, but not by the other; both subject lands to the satisfaction of judgments—the act of 1807, by the process of *elegit*—the act of 1812, by a common *fieri facias*. In Maryland, there is no statute declaring that judgments shall create a lien on lands, but the act of 5th George II., subjecting lands to sale in payment of debts, in the same manner as chattels, is still in force in that State. This act of Parliament has been con-

strued as creating a lien on the lands of the defendant from the time of the rendition of the judgment.—Tayloe v. Thompson, 5 Peters, 358, and cases there cited.

We think both the acts of 1807 and 1812, before refered to, should be construed as creating a lien on the lands of the defendant from the time of the rendition of the judgment, and that the plaintiff may elect to enforce or execute his lien, either under the one or the other of those acts. As we have come to the conclusion that all judgments and decrees of courts of record create a lien on the lands of the party against whom they are rendered, by virtue of the act of 1812, there can be no doubt but that a judgment for costs alone will create a lien on the land of the party against whom it was rendered, for without doubt, under this act, the execution for cost may go against the goods and chattels, lands and tenements, in the same manner that an execution may issue on any other judgment or decree, and such a judgment must like any other create a lien on the land of the defendant from the time of its rendition. To say that it only created a lien from the time the cost was taxed by the clerk, would be to deny the lien to the judgment, which is the act of the court, and to refer it to the ministerial act of the clerk. The statute that creates the lien does not justify such a construction.

2. The return on the execution was not essential to enable the plaintiff to maintain his action; all that is necessary to enable a purchaser at sheriff sale to recover in ejectment is the judgment, execution and sheriff's deed. He cannot be affected by any irregularities of the sheriff, either in not giving the notice required, or in the return he may make on the execution.—Love & Williams v. Powell, 5 Ala. 58. In the case of Driver v. Spence, 1 Ala. 540, the purchaser to make out his title offered in evidence the execution under which the land was sold. This was objected to, on the ground that the levy endorsed on the writ did not correspond with the land described in the sheriff's deed. This court held, that the objection was properly overruled. These authorities we think hold the correct rule. The title of a purchaser who has purchased under a valid judgment and execution, and who has paid the purchase money, should not be made to depend on the return of the sheriff, or whether any return is ever made on the writ

or not.—Heath v. Black, 7 Blackford, 154; Henly v. Branch Bank of Mobile, at this term. From this view, it follows that it was unnecessary to read the endorsement on the execution, showing the levy, and consequently the evidence of the sheriff which was intended to explain it, was immaterial and unnecessary, for it could not affect the right of the plaintiff to recover. He acquired no aid from this testimony and could not be injured by its rejection. We could not therefore reverse the judgment for the admission of this evidence, even if we were to hold that parol proof could not be received to explain or vary the legal effect of a sheriff's return, unless upon a direct proceeding for the purpose of amending it.

3. But there can be no doubt, we think, that the court erred in rejecting the proof offered by the defendants, tending to show that the sale and purchase of the land was brought about for the purpose of defrauding the creditors of Jonathan Steele, and was intended to delay and hinder them in the collection of their debts. All the authorities agree, that a deed procured or obtained with the view or intent to delay, hinder or defraud creditors is absolutely void against those who are intended to be injured by it. That the deed purports to be made by a sheriff in pursuance of a sale under execution cannot impart to it vitality, or enable the fraudulent grantee to consumate his illegal purpose. Whether the deed be direct from the fraudulent grantor to the fraudulent grantee, or whether it be procured by means of a sale under an execution, when once the fraud is established, it is null and void, and can form no impediment to creditors in subjecting the land to the payment of their debts.—Carter v. Castleberry, 5 Ala. 277, and cases there cited; Duncan & wife v. Forsythe, 3 Dana, 229. The court should have admitted the evidence tending to show that the deed obtained at the sheriff's sale was fraudulent, and was intended to hinder and delay the creditors of Jonathan Steele, and should also have admitted the evidence, tending to show that the deed from Badger to the plaintiff was without consideration, and that he had notice of the fraud, for if he is not a purchaser for a valuable consideration and without notice of the fraudulent design intended to be consummated by procuring the deed by means of the sale under the execution, then he is affected with the

fraud, and occupies no higher ground than the purchasers at the sheriff's sale would were they the plaintiffs. This error must reverse the judgment, and as the question whether Badger, the immediate grantor of the plaintiff, was a competent witness to prove the execution of the deed from himself to the plaintiff, can be avoided upon another trial, we do not deem it necessary to examine it.

Let the judgment be reversed, and the cause remanded.

GRAY *vs.* GRAY, BY NEXT FRIEND, &c.

1. An execution for costs cannot issue against the next friend of the complainant in a chancery suit, upon the return of "no property" on an execution against the defendant, without the previous order of the chancellor.
2. Does the statute (Clay's Dig. 316, § 23,) authorising the clerks of the several Circuit and County Courts, &c., upon the return of no property on an execution against the defendant, to issue execution against the plaintiff for the costs, &c., apply to Courts of Chancery?—QUERE.

Appeal from the Chancery Court of Lowndes. Tried before the Hon. Jos. W. Lesesne, chancellor.

STONE and JUDGE, for plaintiff in error:

This case turns on the construction of the statutes—Clay's Dig. p. 316, § 23, and p. 310, § 25—which were enacted in 1826 and '7, while the circuit and chancery courts were one.

The statute empowers *clerks of the circuit courts, clerks of the county courts* and *justices of the peace,* whenever executions are returned "no property found," to issue against the successful party for costs caused by him. Stronger language could not well be employed to convey the idea that all executions then issued by the officers enumerated were intended to be embraced.

If it be necessary, this construction is greatly strengthened when we reflect that the object of the Legislature must have been, to hold those who caused litigation, and consequent la-

bor of those officers, responsible to those officers for the costs. Mrs. Gray caused the litigation here.

The *prochein amy* of a feme covert is responsible for costs. Daniel's Ch. Pr. 42 and 96–7, and notes.

BOLING, for defendant:

The common law does not authorise the issuance of an execution against the plaintiff when one against the defendant is returned no property found; but if it did, it would not apply to a case of this kind, where the chancellors and Supreme Court have a discretion in apportioning the cost. In a court of law, the judgment fixes the cost on the unsuccessful party. In a court of chancery the cost may be decreed against the successful party.

The statute to be found in Clay's Digest, 316, § 23, does not apply to courts of chancery. It expressly says clerks of the circuit and county courts and justices of the peace; although the circuit courts then had chancery jurisdiction, yet if it had been intended to apply to chancery causes, the word complainant would have been added after the word plaintiff, and some other word, such as master in equity, would also have appeared somewhere in the statute. There being nothing used showing the statute applies to chancery cases, and that being the only authority for such a practice, the order of the chancellor must be right.

PARSONS, J.—This is an appeal from the Chancery Court of Lowndes county. It appears that Mrs. Gray, by her next friend John M. Cole, filed her bill in chancery for a divorce from her husband Joshua Gray. The chancellor granted the divorce, with costs against the husband. This court reversed the decree in respect of the divorce, but affirmed it as to the costs of the Chancery Court.—Gray v. Gray, 15 Ala. Rep. 779. The register accordingly issued his execution against the husband for the costs, which was returned "no property found;" and the register thereupon issued an execution against Mr. Cole, as next friend of the complainant, for the costs. This last execution was set aside by the chancellor, under an impression that the register was not authorised to issue it by the circumstances of the case, as just stated; and the present appeal is from the order setting the execution aside.

The question depends upon the statute of 1826, which is as follows: "The clerks of the several circuit and county courts, and the justices of the peace in the several counties in this State, are hereby authorised, whenever any sheriff, coroner or constable, shall return on an execution directed to them, or either of them, that the defendant in said execution has no property in his county, out of which he can make the amount of the costs due on said execution, forthwith to issue execution against the plaintiff in said execution for the costs created by the plaintiff in obtaining his judgment and execution; and no costs created by any defendant on the part of the defendant shall be taxed or collected in said execution.—Clay's Digest, 316, § 23. This statute introduces a new practice at law, if not in equity, in permitting an execution in certain cases against a party, without any judgment against that party. We do not decide the question, whether in general, this statute applies to the courts of chancery. But in the present case, the execution issued against the next friend of the complainant, and there is no decree or order of the chancellor against him for the costs. Now, if the statute applies to chancery cases at all, there is a reason why it should not apply to such a case as this; because, if the wife had a separate estate, it might be proper to order the costs to be paid out of it, and thus to relieve the next friend. This results from the principles stated by Sir Wm. Scott, in D'Anquillar v. D'Anquillar, 1 Hazzard's Excl. Rep. 787. He says, "in general the husband is is bound to defray the wife's costs, otherwise the wife would be disarmed and denied justice. The husband has, by the law of this country, all the property, and therefore the wife must have the means of self-defence and of subsistence from him; but when she has a separate fortune the court always considers whether such separate means are sufficient for self-defence and self-subsistence."—See also Wood v. Wood, 2 Paige's Rep. 108. In such cases, the husband even will be relieved of her costs, and her next friend much more readily; for we could easily cite authorities, if necessary, to show that the courts are inclined, whenever they can, to favor the next friends of infants and femes covert, where they have acted in good faith. It is possible, at least, in any case, that a feme covert may have a separate fortune. It is proba-

ble, under our recent statutes, that this will be so generally true, before many years, as to change the presumption of law. It may soon be the legal presumption in this State that every feme covert has a separate estate. Be this as it may, they are already capable of holding separate fortunes, and if it had been or should be shown in the present case that Mrs. Gray has an estate of her own, the chancellor would take the necessary measures to have the costs paid out of it. For this reason we think that the statute does not apply to this case, because we think that no execution for the costs should issue against the next friend, except in pursuance of an order or decree of the chancellor. In such case the statute is not equivalent to a decree—whether or not it is so in any chancery case, we do not now decide. The order of the chancellor setting aside the execution is therefore affirmed.

WILLIS, Adm'r, *vs.* WILLIS' DISTRIBUTEES.

1. A decree of the Orphans' Court, rendered on the day that the administrator presents his accounts and vouchers for settlement—without the accounts being previously examined, audited, stated, and reported by the judge for allowance at a succeeding term—without the appointment of guardians *ad litem* for the infant distributees—and without an order as to the person or persons to whom the balance found in the administrator's hands is to be paid—conforms to none of the requisites essential to a final decree.
2. To render the annual settlements of an administrator *prima facie* evidence, so as to dispense with further proof of the items on final settlement, it is necessary that the distributees should have been allowed an opportunity of objecting to the items, and contesting their correctness.
3. If an administrator receives as assets of the estate a note, secured by mortgage on property more than sufficient to pay it, and makes no effort to enforce the security, he is chargeable with the amount of the note, notwithstanding the insolvency of the maker, unless he shows some satisfactory reason for his failure to do so.
4. An administrator, who, after receiving the assets of the estate, is superseded by the appointment of another, and, upon the resignation of the latter, again invested with the trust, is liable on final settlement of the administration last assumed to account for the assets received on the first, and not delivered by him to the intermediate administrator.

Error to the Orphans' Court of Montgomery. Tried before the Hon. Thos. S. Mays, Judge.

LETTERS of administration on the estate of Brittain Willis, deceased, were granted to the plaintiff in error in January 1837, revoked and granted to Moses McLemore in October 1845, and, on his resignation in April 1846, again granted to the plaintiff. The plaintiff in error, on the final settlement of his last administration, offered his settlements made in June and October 1838, February 1841, and January 1843, as *prima facie* evidence of the correctness of the various items of credit contained in them respectively. The defendants in error objected to them as insufficient for that purpose, they not having had notice of, and been made parties to those settlements,—which objection the court sustained, and, the plaintiff failing to adduce other proof of their correctness, disallowed the credits. Among these credits, was one of $83 58, it being the amount of a note of one John Robinson, and which had been allowed in the settlement of October 1838. The proof was, that at the time of the original grant of administration, Robinson was insolvent, and has so contiued ever since, but that he had executed to the intestate, to secure the payment of this note, a mortgage on a tract of land more than sufficient in value to discharge it, which mortgage was received by the plaintiff with the note soon after the grant of administration to him in 1837. The mortgage was never recorded, but its existence was notorious in the neighborhood of the land, and it remained all the time in the hands of the plaintiff without an effort to enforce it, during which time the land was sold by the mortgagor to an individual living near it. The foregoing facts, with what appears in the opinion of the court, are deemed sufficient for a full understanding of the points decided. The ruling of the court and its decree are now assigned as error.

THOS. WILLIAMS, for plaintiff in error:

1. The final settlement, made in February 1841, was valid and binding, and could not be opened or reviewed, altered or amended.

2. The accounts, and settlements made on them by the administrator, before the judge, and passed on by him in June

1838, October 1838, February 1841, and June 1843, were *prima facie* correct, and could not be rejected on subsequent settlements, but upon proof by the heirs of the incorrectness of such accounts.—Powell v. Powell, 10 Ala. Rep. 910; Willis v. The Heirs of Willis, 9 ib. 330.

3. An administrator or executor is not liable for the loss of a debt upon contract with the testator or intestate, unless the executor or administrator be guilty of gross negligence. Ordinary diligence excuses him. Schultz v. Pulver et al. 11 Wend. 361; Truman v. Fairlie, 3 Mer. 42; Tebbs v. Carpenter, 1 Mad. 298; Thompson v. Brown, 4 Johns. Ch. 619; Rowth v. Howell, 3 Ves. 565.

It is insisted, that if there be any want of conformity to law on the part of the court, it ought not to operate against the administrator. All he could do was to attend the court and vouch his accounts—the judgment entry was no part of his duty.

Elmore, for defendant:

1. When annual settlements in the Orphans' Court are so irregular that on error they would be reversed, they are not in conformity with the statute, and are not *prima facie* evidence.—Clay's Dig. 226, § 27; Douthitt's Adm'r v. Douthitt, 1 Ala. Rep. 594; Robinson & Wife v. Steele, 5 ib. 473; Willis' Adm'r v. Willis' Heirs, 9 ib. 330; Powell v. Powell, 10 ib. 910.

2. And the settlement in February 1841 is obnoxious to the same objections, as not being in conformity with law.—See authorities *supra*.

3. The settlement in February 1841 is not final, though purporting to be such. There is no judgment or decree on it; the administrator makes subsequent settlements; he submits without objection to file his accounts in this case for a final settlement, and thereby waives any right from that settlement, and admits it is not final; the records show it in fact not to be final.—Dement v. Adm'rs of Boggess, 13 Ala. 140.

4. Though the settlements are regular, the court on final settlement may look into them and correct errors apparent on their face. In this case, the previous settlements run into and make part of the subsequent ones; and in that of February

1841, there is manifest error in charging the estate with the board of the children.—Willis v. Willis, 9 Ala. Rep. 330, and authorities *supra.*

5. But we think the record shows this to be a settlement of the administration *de bonis non;* and if so, he had no right to introduce the settlements of his previous administration as evidence for him, unless the distributees had offered them to charge him.

On all the above points the record does not show that there is any error or injury to the administrator.

6. His negligence about the note of Robinson was so gross that he ought to have been charged with the amount.

CHILTON, J.—It is contended that the decree rendered by the Orphans' Court, on the 1st of February 1841, is *final*, and that it is conclusive on the defendants in error. If this position be tenable, then the court erred in permitting the distributees to go behind that settlement, and in charging the administrator for a greater sum than was fixed by that decree, up to that time.

The entry, which it is insisted has the effect of a final decree, reads as follows: "This day being set apart for the final settlement of the estate of Brittain Willis, deceased, due publication thereof having been made, the court proceeded to examine the account and vouchers of Price Willis, administrator, which were found correct, and there is in the hands of said administrator the sum of forty-one 81-100 dollars, as per account current, which was examined, approved, and ordered to be recorded." Then follows the account of the administrator, by which he charges himself with

"Amount due on last settlement, - -		$1103 31
Interest, - - - - - - -		202 00
Making total amount, - - - -		$1305 31
And credits himself by the board of seven children for three years, at $5 per month, - - - - -	$1260 00	
Expense of publication, - -	3 50	
Leaving balance due by administrator,	41 81	
		1305 31"

This decree (if one it may be called) does not possess the first

requisite to constitute it a regular final one. It seems to have been an *ex parte* proceeding by the administrator, who produced his account on the day of settlement, which was examined, pronounced by the judge to be correct, and ordered to be recorded; whereas the statute required the account to have been exhibited with the vouchers to the Orphans' Court, upon the application of the administrator for final settlement, so that the judge might examine and audit it, and after having it properly stated, might report the same for allowance to a succeeding term—(Clay's Digest 226, § 27.) The object of the law in requiring the account and vouchers to be thus presented and stated, and publication to be made, &c., is to give the parties an opportunity to contest it, and to prepare for the contestation, between the presentation of the account and the time set for final settlement. No guardians *ad litem* were appointed for the infant distributees, who were wholly unrepresented, and who were illegally charged with $1260. Aside, however, from these irregularities, the act of 1830 (Clay's Dig. 304, § 42,) declares that all decrees made by the Orphans' Court on final settlements of executors, administrators, &c., shall have the force and effect of judgments at law, and executions may issue thereon for the collection of the several distributive amounts, against such executor, administrator, &c., and the court is required to insert in the final decree the amount of each distributee's share (Digest, 305, § 44.) These essential requisites to the regularity of the decree are wanting in the case before us. But it cannot be *final*, because there is not any order that the administrator pay the amount in his hands to any one, and no one is even named in the entry who is authorised to receive it. In short, there is no sentence or judgment of the court that any sum should be paid by the administrator or recovered by the distributees. See, as to the pre-requisites to a final decree, Robison & Wife et al. v. Steele, adm'r, 5 Ala. Rep. 473; Horn v. Grayson, 7 Port. Rep. 272; Douthitt, adm'r, v. Douthitt, 1 Ala. (N. S.) 594; Willis v. Willis, 9 ib. 330; Powell v. Powell, 10 ib. 910.

2. When this case was before this court at a previous term, (9 Ala. Rep. 330,) it was held that annual settlements, when made in conformity to law, are *prima facie* to be considered correct, but may be impeached by proof showing their incor-

rectness. But it was added, that in this case the accounts are upon their face inadmissible, and such as the County Court had not the power to allow upon a settlement with the administrator. This remark was influenced more particularly, if not exclusively, by the account for board, &c., which was allowed the administrator against the infant distributees. So far as respects the charge for board, &c., of the children of the intestate, the case is concluded by the previous adjudication; but this item does not occur in any of the annual settlements made previous to the 1st of February 1841. Are the other entries upon this record, which are insisted on as annual settlements, such as to afford *prima facie* evidence of their correctness, and to cast upon the distributees the necessity of falsifying the accounts? At first we were inclined to think they were, but subsequent examination has satisfied us fully that we were mistaken in that impression. In the first place, it does not directly appear that the court allowed the accounts presented by the administrator. The entry merely recites that the administrator made his annual settlement as per account current, examined, and ordered to be recorded. But conceding that this criticism on the language employed in the entry is too rigid, and that we will infer a settlement from the fact that the court examined the account and ordered it to be recorded, yet the settlement was not in accordance with the requisitions of law. Not that it is wanting in conformity in some formal or unimportant particulars, but in matters of substance, which are required to be observed for the protection of those whose rights are to be affected thereby. I have examined our statutes in vain to find a law authorising such annual settlements to be made without notice to the parties. I can find no warrant for such *ex parte* proceeding, and the learned counsel for the plaintiff in error, after having his attention specially called to this point, has been unable to find any—I take it for granted that none exists. The act of 1843, passed since these alleged settlements were made, requires notice, and the statutes existing previously, whenever settlements are mentioned, required them to be made upon notice. These settlements, if such they were, were not only *exparte* and without notice, but they were made at the same time the accounts were presented, without any order appointing guar-

dians *ad litem* for the infants interested as distributees, and no publication was made as pointed out by the statute.—Clay's Digest, 226, § 27. They are then wholly informal and irregular, and the distributees who have had no opportunity whatever of contesting the correctness of the accounts thus summarily presented and acted on, should not be placed in any worse condition than if such settlement had never been attempted. To render such annual settlements *prima facie* evidence of their correctness, and to dispense with further proof of the items therein embraced on the part of the administrator, they must substantially conform to the requisitions of the statute, at all events, the distributees against whom the record of them is sought to be used as evidence, must have had an opportunity of objecting to the items when allowed, and contesting with the admintrator their justness.—See Willis v. Willis, *sup.* and authorities on the brief of the defendant's counsel. But although such annual settlements may be regularly made, the court may examine into their correctness on the final settlement and rectify any mistakes which may have intervened. In Savage v. Benham, adm'r, 11 Ala. Rep. 55, this court held that the annual settlements of executors, &c., before the statute of 1843, had no other effect than to furnish the means of arriving at the true state of the final account, and the preservation of evidence in favor of and against the party making them. 9 Ala. Rep. 330; ib. 615; 10 ib. 910; 5 ib. 473; 1 ib. 594. The court therefore correctly held, these entries did not cast on the distributees the necessity of impugning the accounts in order to compel the administrator to adduce proof in support of them. In other words that such alleged settlements were not *prima facie* evidence of the correctness of the vouchers, &c. embraced in them.

3. As to the note on Robinson, we think the administrator was properly chargeable with it under the proof disclosed in the record. It appears that it was secured by mortgage, and no reason is shown why it was not collected. It does not appear that the administrator made any effort to render the security available. The bill of exceptions must be construed most strongly against him, and this fails to show that the person who purchased the land from the mortgagor had not notice of the mortgage, in which event he would hold it subject

to the incumbrance, notwithstanding it had not been recorded. If, from the smallness of the demand, and difficulty and expense of foreclosure, the interest of the estate required that he should not have engaged in litigation respecting the note, he should have shown this. But he neither proves this, nor any other fact which shows that he has not been guilty of gross neglect in failing to collect the note, and therefore should have been charged with it.

4. There can, we think, be no doubt that where one is appointed administrator in chief, and receives the assets of the estate in that capacity, and after having been removed, and another administrator appointed, is upon the resignation of the intermediate administrator, again appointed, he is liable on the final settlement of his administration last assumed to account for the assets received by him under his first appointment, and which he had never delivered over to the intervening administrator *de bonis non.* The property remaining belonging to the estate in his hands, is not in any manner changed by the administration *de bonis non*, it still remains assets in his hands, and being the administrator, he is bound to account for the same. Whether he is called upon to do so as administrator in chief or *de bonis non*, is a matter of no importance.

We feel no doubt as to the correctness of the ruling of the Orphans' Court, and contrary to our first impression, determine that the decree must be affirmed.

WINDHAM *vs.* CLARKE ET AL.

1. When a claimant has appeared and proceeded without objection to a trial of the right of property, he cannot insist for the first time in this court that the suit was discontinued for want of prosecution.
2. Either party in a claim suit has the right before trial to require that the issue be made up, but if they go to trial without doing so, the want of an issue cannot be assigned in this court as error.
3. Where the verdict in a claim suit finds the issue generally in favor of the plaintiff, a judgment condemning the *interest* of one defendant in execution only is variant from the verdict and erroneous, but the error

is one which does not require the cause to be remanded, and will consequently be here corrected at the cost of the plaintiff in error.

Error to the Circuit Court of Pickens. Tried before the Hon. Samuel Chapman.

Peck, for plaintiff in error.

Hungtington, for defendant.

DARGAN, C. J.—The record shows that an execution was issued from the County Court of Pickens, on the 2d day of February 1846, in favor of the defendants in error against James F. Tanner and Elizabeth Tanner, which was levied on the 5th day of June thereafter, on certain slaves, as the property of the defendants. On the 24th of June, the plaintiff in error claimed the slaves levied on, as his own, and made the usual affidavit in order to try the right of property. Nothing more appears to have been done in reference to the claim until the October term of the Circuit Court 1848. At this term we find the following entry: "This day came the parties by their attornies, and thereupon came a jury, &c., who being elected, tried and sworn well and truly to try the issue joined, upon their oaths do say, we the jury find the issue in favor of the plaintiffs in execution." The verdict then ascertains the value of each slave separately, upon which the court rendered judgment, that the interest of Elizath Tanner in said slaves be subject to be sold under said execution.

It is contended by the plaintiff in error that the cause was discontinued, and that the court should not have proceeded to try the right of property. It is true that the record does not inform us when the claim was returned to the Circuit Court for trial; but admitting that the claim was never returned until the term at which it was tried, yet as the claimant then appeared and made no objection to a trial, he cannot be heard in this court for the first time, alleging that the suit founded on the claim was discontinued for want of prosecution. When parties appear and go to trial on the merits of the cause without any objection, they must be considered as having waived the right, *if any they had, to have the suit discontinued.* We however, do not decide that the plaintiff in error was entitled

to move the court for a discontinuance—however that may be it is too late to claim that right after he has submitted to a trial in the court below without objection.

2. Nor can the plaintiff complain that it does not appear that an issue in writing was made up before the trial. In the case of Dent v. Smith, decided at the last term, we held that either the plaintiff in execution or the claimant had the right before the trial to insist that the issue be made up, but if this was not done, and the parties went to trial as if it had been, neither party can assign for error in this court that the parties proceeded to trial without an issue joined.

3. The judgment, however, does not correspond with the verdict. The verdict condemns the slaves to the satisfaction of the execution, but the judgment is that the interest of Elizabeth Tanner in said slaves be subjected to be sold under said execution. The judgment is erroneous in this respect—it should have been a judgment condemning the slaves to the satisfaction of the execution, and not a condemnation of the interest of Elizabeth Tanner, who was not, so far as we are informed by the record, a party to that issue. This error, however, is not such as requires the cause to be remanded, but the proper judgment must be here rendered, at the cost of the plaintiff in error, condemning the slaves to the satisfaction of the plaintiff's execution.

ALEXANDER *vs.* THE STATE.

1. An indictment against the overseer of a road, which describes it as "a public road of the second grade, beginning at and leading from the twenty-third mile post to the county line," is sufficiently certain.
2. Any description in an order of the commissioners' court, appointing an overseer, by which the road can be ascertained, is sufficient; and such order is not void, or inadmissible in evidence, because it designates the road by a name different from that by which it is known in the neighborhood.

Error to the Circuit Court of Benton. Tried before the Hon. Thos. A. Walker.

J. B. MARTIN, for plaintiff in error:

1. The demurrer should have been sustained to both of the counts in the indictment for their uncertainty in the description of the road, for not keeping which in repair, &c. he was indicted. Such certainty should be observed in the description of offences as, 1st. To secure the defendant against the *possibility* of being put upon his trial for a different offence: 2d. That a conviction or acquittal will secure the defendant against a second prosecution for the same offence: 3d. That the defendant may know the *specific* offence with which he is charged (in this case, the *particular* road which he as overseer is charged with having failed to keep in repair, &c.) that he may come prepared for his defence: 4th. To enable the court when the defendant is *convicted*, to determine whether the facts *charged* are sufficient to support the conviction.—Wharton's Crim. Law, 196; 1 Chittty's Criminal Law, 196; 1 Richardson, 179.

2. The second charge asked should have been given. We cannot shut our eyes to the fact that there must have been many roads in the same county, identical in the general and uncertain description in the indictment of the road in question, and especially when it is in proof that the road upon which defendant was alleged to be the overseer never was known by the name or description given it in the indictment. The charge was *correct and should have been given.*—See Beene v. Phillips, at the present term, and authorities there cited.

ATTORNEY GENERAL:

1. The charge asked by the plaintiff in error, required the court below to assume the functions of the jury and say that certain facts "*did not prove*" certain things, which was properly refused.

2. The court committed no error in overruling the demurrer to the indictment. The only question raised was as to the description of the road. It was sufficient in the indictment to follow the name by which it was designated by the commissioners' court, which was "*a road commencing at the twenty-third mile post and leading to the county line,*" which will appear by the order of the commissioners' court appointing the plaintiff in error the overseer, and the notice served on him

by the sheriff and witness Wheeler, that he worked that road. This added to the fact that the road was out of order for more than ten days at one time was sufficient.

3. The fact that this road was known by the name of the Jacksonville road in the neighborhood where it lay will not alter the case. A road, like a person, may have two names, and an indictment by either will be good.

PARSONS, J.—The plaintiff in error was indicted "as overseer of a public road of the second grade, beginning at and leading from the twenty-third mile post to the county line," within the county of Benton. The indictment has two counts describing the road substantially in the same language; and there was a general demurrer to each of the counts, which was overruled. It is now contended for theplaintiff in error that this description is defective and uncertain, and that the demurrers should have been sustained. It is true, that there may have been different roads of the same grade, leading from the twenty-third mile post to the county line; but it is alleged in the indictment that the plaintiff in error was the overseer of the piece of road now in question. As the burthen of proof lay upon the State, it is clear that the solicitor had not the power to shift his charge at the time of trial to any other piece of road which might admit of the like description, because it would be necessary to connect the overseer with it by proof. The offence is of the lowest grade, and the utmost certainty is not required.

There were several exceptions to the ruling of the court below, as appears by the bill of exceptions, the second of which is now insisted on as error. This supposed error was in admitting as evidence the order of the commissioners' court of roads and revenue, by which the plaintiff in error was appointed "overseer of the road from the twenty-third mile post to the county line, second grade." This is insisted on the more as error, because it was proved that this piece of road was not known in the neighborhood by that name or designation, but that the same was known as the road from Jacksonville to Cedar Town, Georgia. The description of the road in the order is not void, because it does not conform to the neighborhood name or designation, nor is the indictment variant

from the order. Any description in the order by which it could be ascertained was sufficient. We have examined the whole record and can discover no error.

Let the judgment be affirmed.

BOLING *vs.* WRIGHT ET AL.

1. B., the owner of a slave, gave permission to W. to whip him whenever he should find him on his premises, and to use such means as were necessary and proper to keep him away. W. caught the slave on his premises, and whipped him, and, having found him there again, about three years afterwards, inflicted on him a whipping of much greater severity: *Held*—1st. That in an action of trespass for the second, evidence of the first whipping is admissible in mitigation of damages. 2d. That if the plaintiff desired to restrict its influence upon the jury, he should have asked appropriate charges of the court limiting its legal effect.

Error to the Circuit Court of Butler. Tried before the Hon. Nathan Cook.

This was an action of trespass *vi et armis* by the plaintiff against the defendants in error for an assault and battery committed by them on the person of a slave, the property of the plaintiff. Pleas—not guilty, and that they whipped the slave by permission of the plaintiff, which is the trespass complained of. The case having been made out on the part of the plaintiff, Wright, one of the defendants, introduced evidence tending to show that on the night of the alleged trespass the slave was run from his premises, and that the plaintiff had authorised him to whip said slave should he thereafter be found there, and to use such means as were necessary and proper to keep him away. The defendants then offered to prove that about three years before, but since the authority above spoken of was given by the plaintiff, the same defendant caught the slave on his premises and gave him eighty lashes. This evidence was offered for the purpose of showing the necessity for a severer whipping than that then inflicted. It having been made to appear that the whipping now com-

plained of was unusually severe and such as to incapacitate the slave for labor for the space of two weeks, the plaintiff objected to this evidence, but the court overruled the objection and suffered it to go to the jury. The ruling of the court is the error now assigned.

JUDGE & STONE, for plaintiff in error:

1. It was improper to allow *one whipping* to be given in evidence *in mitigation of another*. The evidence of the conduct of the negro *on one occasion*, years before the institution of the suit, was *irrelevant*, and therefore illegal. It was allowed to be introduced *in mitigation*, and was calculated to mislead the jury.

WATTS & JACKSON, for defendants in error:

1. The evidence admitted was clearly admissible in *mitigation* of damages, and if admissible for any purpose, it was no error to receive it—whether it would *justify*, is not presented on the record properly. If plaintiff had intended to make that point, he should have asked the court to charge on it.

CHILTON, J.—The general rule as applicable to the admission of evidence in actions of this sort is, that the defendant may give in evidence any circumstances connected with the transaction, for which the suit is instituted, in mitigation of the injury done by the trespass, if the matter set up does not amount to a complete justification.—2 Greenl. Ev. §s 272, 274. So in Wills v. Head, 4 C. & P. 568, (S. C. 19 Eng. Com. Law Rep. 531) it was held, that where the owner of sheep shot a dog, which had worried them, not however in the field where the sheep were worried, but some distance from it, though the shooting was not justifiable, yet the habits of the dog should be received in evidence in mitigation of damages. Upon the same principle, in actions for malicious prosecutions, circumstances of suspicion connected with the notorious bad character of the plaintiff have generally been allowed in mitigation of damages.—2 Greenl. Ev. § 458; 2 Phil. Ev. 258. The courts have constantly felt the difficulty of laying down any general rule upon this subject, and the evidence offered must, in a great measure, depend for its legality on the nature of the offence charged, and the peculiar circumstances attend-

ing it. The most that could be said is, that the circumstances offered in mitigation must not be so remote as that by just inference they may not be supposed to have connection with the act complained of, as explanatory of its character, or of the motives and intention of the defendant in its commission.

In the case before us, the defendants insisted that they had permission of the plaintiff, who was the owner of the slave, to whip him, if found upon their premises, and to use such means as were necessary to prevent his going upon their premises. After this permission they did whip him, giving him eighty lashes, and this whipping they proposed to show was not sufficient to prevent the repetition of his offence, and rendered it necessary, under the license they had, to use more severity than before. In this view, we feel no hesitation in saying the evidence was proper in mitigation, and if the plaintiff below desired to restrict its influence upon the jury, he should not have moved its entire exclusion, but should have asked appropriate charges of the court limiting its legal effect.

Let the judgment be affirmed.

HICKMAN *vs.* THOMAS.

1. H., an inn-keeper, furnishes G., who is not his guest, but a mail contractor, with stables and provender for his horses for more than two years, during which time they are under the care of, and fed by the servants of G., and regularly used by him in running his stages to and from the stables of H. *Held*—That H. has no implied lien on the horses for the debt thus contracted by G.

Error to the Circuit Court of Jefferson. Tried before the Hon. John D. Phelan.

Thomas, the defendant in error, claiming under a deed of trust, executed on the 25th October 1848, by William H. Grimes, brought an action of detinue against the plaintiff in error to recover eight horses. The plaintiff in error, who was the defendant below, rested his defence upon the assertion of

a lien on the horses, the foundation of which will be sufficiently understood by reference to the facts noticed in the opinion of the court.

Ernest, for plaintiff in error:

1. The first question raised by the record is the extent of a landlord's lien. The evidence tends to show that it was on the faith of that lien that plaintiff fed the horses. The temporary use of the horses amounts to nothing if the landlord recovers them peaceably and enforces his lien.

2. The second question is that of a pledge raised by the evidence of the confession of Grimes, clearly showing that Grimes had pledged the horses for their feed.

Wm. S. Mudd, for defendant in error:

1. To constitute a pledge for the security of a debt or other engagement, it is necessary that the thing should be actually delivered the pledgee, and that he should retain the possession of it. If the pledgee has not the actual possession, or if he delivers it back to the pledgor, his title terminates.—Story on Bailm. 202, § 299.

The only legal way in which property can be made a security for the payment of a debt when the possession remains with the debtor, is by deed of trust or mortgage, duly recorded as the statute requires.

But what proof is there of a pledge in this case? The only evidence on that point is, "that Grimes stated to two witnesses that Hickman need not be uneasy about his money, as he had a lien on the horses," &c. Does a statement like this establish a pledge? May it not be as reasonably supposed that Grimes refered to some other kind of lien as to that of a pledge?

2. To create the lien of an *inn keeper*, it is necessary, 1st: that the relation of guest should exist, that is to say, the person must be a traveller or way-faring man.—Story on Bailm. 311, § 477. 2d. The inn keeper must have the possession of the property and the possession must be continuous.

The proof shows that Grimes did not sustain the relation of guest to Hickman, during the time the latter furnished feed for the horses of the former. If Hickman had refused to feed

the horses under the circumstances, would he have incurred any liability to Grimes, by virtue of his obligation as an inn keeper? If he would not, then he ought not to be invested with any of the peculiar privileges of an inn keeper. An inn keeper is *only* bound to take in all travellers and way-faring persons, and to accommodate them, their horses and attendants, if he can do so, for a reasonable compensation.—Story on Balm. 310 & 311, § 475 and 476. Hickman might then have well refused to feed the horses of Grimes, which he was using in the transportation of the mail.

3. Possession is not only essential to the creation, but also to the continuance of the lien, and when the party voluntarily parts with the possession of the property upon which the lien has attached, he is divested of his lien.—2 Kent's Com. 638. This rule is laid down as applicable to factors, but it applies equally to inn keepers.

It does not in fact appear from the proof that Hickman ever had the possession of the horses before the death of Grimes. He furnished a stable and feed for them it is true, but the driver, who was employed by Grimes, fed, watered and attended them, and at all times had the control of them. If, however, it be admitted that Hickman did at one time have possession, it is shown that he daily parted with the possession voluntarily. If Grimes had made an absolute sale of the horses when they were away from Hickman's stable, under the circumstances disclosed in the bill of exceptions, will it be seriously contended by any one, that Hickman could have sued the purchaser and have recovered under his pretended lien as inn keeper? If he could not recover in a case like the one supposed, neither can he recover in the one at bar.

DARGAN, C. J.—The first question to be ascertained is whether Hickman, the defendant below, had a lien on the horses to pay for their feed? If he had not, it is immaterial to enquire whether the deed of trust from Grimes to the plaintiff was duly recorded or not, for the deed as between Grimes and Thomas the plaintiff is valid, and if the defendant had no lien on the horses he cannot resist a recovery.

The defendant is an inn keeper at Elyton, Grimes was a mail contractor, and carried the mail by stage coaches from

Tuscaloosa to the Blue Pond, about one hundred and forty miles. The horses were used by Grimes in running the stage from Elyton to another stand on the route and back. They were under the care of and fed by drivers in the employment of Grimes, but the defendant furnished stables and provender for them for more than two years, for which Grimes is indebted to him over four hundred dollars, and to secure this sum, he locked up the horses, asserting a lien on them, and refused to deliver them on the demand of the plaintiff.

We do not think that the defendant can claim a lien on the horses growing out of his character as an inn keeper, for Grimes, the original owner and who owes the debt, was not the guest of the defendant, and all the authorities agree in this, that to entitle an inn keeper to assert a lien on goods in his possession to secure a debt due to him from the owner, he must show that the owner was his guest, and as such became indebted to him. The law will then imply a lien in favor of the inn keeper, by which he may hold the goods of his guest, committed to his custody, until the charges and expenses incurred at the inn are paid.—Grinnell v. Cook, 3 Hill, 485, and the cases there cited.

The claim or debt due from Grimes to the defendant resembles a debt due to an agister of cattle, or a livery stable keeper, from a customer, who is not required to pay what may be due for their keep, on every occasion that he may take possession of the horses or cattle for the purpose of using or employing them; and the law is well settled that neither the agister of cattle, nor the livery stable keeper, under such circumstances, can assert a lien on the cattle or horses to pay for their keep, unless by virtue of an express contract.—Cross on Lien, 214, 222; 5 Mees. & Welsb. 341.

The case of Grinnell v. Cook, before refered to, very much resembles the case under consideration. In that case, Tyler, the owner of the horses, resided in the same village with Grinnell, the inn keeper, but was not his guest. The horses were sent by Tyler to the stables of Grinnell, who fed them for some time, but they were used by Tyler and his servants. Cook a constable, levied an execution on them as the property of Tyler, and the question arose whether Grinnell had a lien on the horses to pay the amount due him for their keep.

The court decided against the lien of the inn keeper. This authority is directly in point, and conclusive to show that the defendant has no lien on the horses. To my mind there is also another reason why the law will not imply a lien in favor of the defendant. A lien in favor of an inn keeper or a tradesman consists in his right to retain the possession of the chattel in opposition to the title of the owner until some charge respecting it is paid, and if the possession is voluntarily surrendered to the owner, the lien is at an end—Beraw v. Waters, 3 C. & Payne, 520; 8 Mod. 172; Jackson v. Cummins, 5 Mees. & Welsb. 342. In this case, the horses were always in the possession of Grimes, and were regularly used by him until the defendant locked them up to secure a debt, some of which had been contracted for more than two years. They were therefore not in the possession of the defendant when the debt was contracted. This within itself would negative the existence of a lien by implication of law.

The judgment of the Circuit Court upon the facts agreed was in conformity with law, and must be affirmed.

TUCKER *vs.* THE STATE.

1. On the trial of a criminal prosecution against a clerk of the Circuit Court for collecting, under judgment in favor of the State, and refusing to pay over to the county treasurer money to which he is entitled, within three days after demand, proof that the collection was made in *county claims* will not support the indictment.
2. The collection by the deputy of money, which the clerk of the court is authorised to receive, is in legal contemplation a collection by the clerk himself, and he is liable accordingly.

Error to the Circuit Court of Coffee. Tried before the Hon. Samuel Chapman.

F. S. Jackson, for plaintiff in error.

Baldwin, Attorney General, for the State:

1. The principal clerk was authorised by statute to receive

the sum of money mentioned in the indictment.—Clay's Dig. 147, § 24; Murray v. Charles, 5 Ala. Rep. 678.

2. The principal clerk is bound by the acts of his deputy in the ordinary course of his business, and payment to his deputy *is a payment to him of the amount of a judgment.*—Weddes v. J. W. & S. Esdell, 2 McLean, 366; Stuart v. Madison, 1 Call, 417.

3. In the absence of principal the deputy is authorised to receive money and transact business, &c.—Clay's Dig. 146, § 19; Kemp & Buckly v. Porter, 7 Ala. Rep. 138.

4. County claims, such as witness' certificates, may be received in payment of fines and forfeitures.—Clay's D. 600, § 7.

5. The paying off of fines and forfeitures with any county claim causes the county claims to be considered as, and to assume the office of money, within the meaning of the 7th ch. 9th sec. of the Penal Code.

PARSONS, J.—This cause comes up on a bill of exceptions, according to the statute. The writ of error is waived by consent of the Attorney General and of the counsel of the plaintiff in error—no writ of error having, in fact, issued, as we suppose. As the case is a misdemeanor, we are willing to decide it, under the circumstances, without the writ of error.

It appears by the transcript that the plaintiff in error was indicted as clerk of the Circuit Court of Coffee county, for this, that he collected certain *money* in his official capacity, in a case of the State against certain persons named in the indictment, which he failed and refused to pay within three days after demand, to the county treasurer, who was entitled to it. It appears by the bill of exceptions that this clerk, by his deputy, collected the amount in question *in county claims*, with the exception of two dollars in money, but there was no proof that any of this had gone into the hands of the plaintiff in error. The court charged the jury that a payment in county claims was a payment in money under the statute. This was erroneous. If a public officer must receive claims of this kind, they are not, therefore, money; they retain their identity, and he is not liable to pay out money in their stead. He was indicted for having collected and refused to pay money, to which the treasurer was entitled. He could not be convicted under

this indictment for having collected and refused to pay over county claims, such as witnesses' certificates: the proof must agree with the allegation. The judgment must be reversed for the error of this part of the charge, but the cause will be remanded, as it appears that the clerk by his deputy did receive some money.—See Clay's Dig. 147, § 24, and ch. 7, § 9, of the Penal Code. The offence created by the last cited act is a misdemeanor. If the clerk's deputy collected the money, a was a collection in legal estimation by the clerk himself, and he is liable accordingly.

It is not necessary to decide whether *a clerk* is authorised to receive county claims in lieu of money, in such cases. That question cannot arise upon the present indictment.

McLEAN *vs.* THE STATE.

1. In criminal, as well as in civil cases, it is within the discretion of the court, on the application of either party, to require the witnesses to be examined out of the hearing of each other, and its ruling in that respect cannot be assigned as error.
2. On the trial of an indictment for murder, the declarations of the deceased, touching the homicide, although he does not state at the time that he is conscious of impending death, if made under such circumstances as in the judgment of the court will reasonably warrant such an inference, are admissible in evidence as dying declarations.
3. Where the deceased, being asked "who shot him," replied, "the prisoner," the declaration is complete, and cannot be rejected, because, from weakness and exhaustion, he was unable to answer another question, propounded to him immediately afterwards.
4. Dying declarations are admissible in evidence, wherever their subject matter has reference to facts and circumstances, which would constitute a part of the *res gestæ*.
5. Where a witness, being asked by the prisoner's counsel why she put a particular question to the deceased just before his death, answered that she did so "in consequence of what the prisoner had told her some two hours previous," this will not authorise the prisoner to give in evidence his conversation with the witness at the time referred to.
6. The prisoner and the deceased having had a difficulty the evening before the homicide, the prisoner threatened that between the setting of the sun

on that evening and its rising on the next day, he would kill the deceased: On the next morning, the sun having just risen, the prisoner, armed with a gun, was on the road that led to the house of the deceased, and immediately before he shot the deceased, had a conversation with a witness, who was examined upon the trial: *Held*—That if the witness, without objection on the part of the prosecution, is permitted to state that the prisoner in that conversation spoke of the difficulty of the evening before, the door is opened for the admission of the entire conversation, and it is error to exclude it, so long as the other portion is suffered to remain before the jury.

7. A witness, who is not a medical man, is incompetent to express an opinion as to the particular species of fits with which any one is afflicted.
8. Where insanity is set up as a defence to an indictment for murder, the subsequent as well as previous acts and declarations of the prisoner are admissible in evidence to show his true mental condition at the moment of the homicide.

Error to the Circuit Court of Russell. Tried before the Hon. J. J. Woodward.

The plaintiff in error was indicted for the murder of one Mavin Whatley. After the jury was impannelled, the counsel of the prisoner asked that the witnesses on the part of the State be put under the rule, which was accordingly done. The State's counsel then made a similar motion as respects the witnesses for the prisoner, which the court granted in opposition to the objection of the prisoner's counsel. Various objections were taken on the trial to the admission and exclusion of testimony, all of which, with the facts upon which they were severally predicated, will be found sufficiently set out in the opinion of the court to render the points decided perfectly intelligible.

Belser & Harris, for plaintiff in error.

Attorney General, for the State.

CHILTON, J.—There was no error in ordering that the witnesses should be examined out of the hearing of each other. It was a matter discretionary with the court, and cannot avail the prisoner on error. It is the uniform practice in civil cases for the court upon the application of the counsel of either party to pass such order, and the rule is the same, both in civil and criminal cases.—1 Greenl. Ev. § 432 (3d ed.) note 1 to pages

58–584, where the authorities are cited. The error first assigned must therefore be disallowed.

2. The 2d, 3d, 4th and 6th assignments, which relate to the inadmissibility of the dying declarations of the deceased as evidence, may be considered in connection. It is insisted that as the deceased had not, at the time he made the declarations proved by the witness Wade, and which were made some three hours before his death, given any evidence by his declarations that he was aware of the near approach of his dissolution, the evidence should have been excluded. The law certainly requires that to render dying declarations admissible, they must be made under a sense of impending death; for it is this sense of his danger that gives to the declaration a sanction considered equivalent to an oath. But in order to show that the party was sensible of his danger, it is not indispensable that he should state it at the time he makes the declarations, or at any time. "It is enough," says Mr. Greenleaf, "that it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be infered from his evident danger, or the opinions of his medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind."—1 Greenl. Ev. § 158. So in Anthony v. The State, Meigs' Rep. 265, it was held, "If the dying person declare that he knows his danger, *or it is reasonably to be infered from the wound or his state of illness*, that he was sensible of his danger, the declarations are good evidence."—1 East. Pl. Cr. 354, Tinckler's case; ib. 357–8, John's case; 6 Car. & P. 386; ib. 631; 7 ib. 187; Wharton's Amer. Crim. Law, 179-80; Anthony v. The State, 1 Humph. 265; Dunn v. The State, 2 Pike, 229; 1 Phil. Ev., C. & H. notes, from page 606 to 612, where the authorities are collected; Chitty's Crim. Law, 569-70; Roscoe's Cr. Ev. 25. The circumstances under which the declarations are made must be shown to the judge, who is to determine upon the admissibility of the evidence.—1 Greenl. Ev. § 160, and authorities in note 4, page 257 (3d ed.); 1 Leach, 504; Chitty's Cr. Law, 570; Wharton's C. L. 183; 1 Stark. Rep. 532; 3 C. & P. 629. We think, under the rule of law as above laid down, and which

is fully sustained by authority, the facts and circumstances shown by the proof, as set out in the bill of exceptions, justified the court in admitting the declarations of the deceased.—It is needless to refer to these facts further than to state, that the deceased had just been shot down, having received sixty small shot in his body, penetrating a vital part, the right breast: that considerable blood flowed externally, as well as into his chest, passing thence into his mouth: that he did not speak from the time he was shot down until taken to the house, and his wounds dressed: and that he was in extreme agony and suffering. It further appears, that in a very short time after he made the declarations to the witness, Wade, he stated to another witness, Mrs. Graves, that he must die, which was repeated. Under such circumstances, if the deceased was sensible of anything, he must have been aware that death was immediately to follow, and was inevitable.

3. It is, however, objected to the declarations proved by Mrs. Graves, that they are imperfect and were not completed by the deceased, and that not having answered all he intended answering, what he did say should be excluded. It appears that this witness, a short time before the death of the deceased, and after he stated that he was going to die, asked him who shot him—he replied, the prisoner. She then asked him the cause of it, but from weakness and exhaustion, the deceased could not and did not answer her question, but shook his head. It is said to be no objection to such declarations, that they were made in answer to leading questions; but that the statement, whatever it may be, must be complete in itself; for if incomplete—if it appear that the dying man intended to connect his statements with qualifications and explanations, which from any cause he was prevented from making—the declarations, so remaining incomplete and unexplained, should be excluded from the jury.—1 Greenl. Ev. § 159, p. 257; Commonwealth v. Vass, 3 Leigh's Rep. 786; Rex v. Fagent, 7 C. & P. 238. The declaration, however, in this case, was complete, and it is not shown that he intended or desired to connect it with any other fact or circumstance, explanatory of it. He simply stated that the prisoner shot him, without attempting to explain the circumstances attending it.

4. It appears that this same witness, Mrs. Graves, asked the

deceased, some five minutes before his death, "whether or not he had forbid the prisoner walking the road that morning, immediately preceding the time that prisoner shot him,"—he answered, "he did not." It is insisted by the counsel, that this answer, relating to a fact distinct from the killing, or shooting, was improperly received as evidence. The law is well settled, that dying declarations are not to be received as evidence, except in cases where the death is the subject of the charge, and the circumstances of the death the subject of such declarations.—1 Greenl. Ev. § 156; 1 Chitty's Cr. Law, 569; 2 B. & C. 605-8; Wharton's Cr. Law, 181. The question propounded by the witness to the deceased involved a statement supposed to have been made by him to the prisoner *immediately* preceding the shooting, and which would thus have constituted part of the *res gestæ*—a circumstance in the unfortunate and fatal occurrence tending to explain it. It had reference to, and was *immediately* connected with the circumstances of the death, and in this light was properly permitted to be given in evidence.

5. There was certainly no error in refusing to permit the conversation had between the prisoner and Mrs. Graves, after the shooting, and in consequence of which this witness propounded to the deceased the question above alluded to, to go to the jury. The witness had not detailed any part of the conversation, which would require that the whole should be made evidence. She was merely asked by the prisoner's counsel, "why it was that she had put such a question to the deceased five minutes before his death," and in response to this enquiry, stated that she had asked the question in consequence of what the prisoner had told her some two hours previously. We know of no rule of law which would permit a party thus to make evidence for himself by proving his own declarations, as original evidence, constituting no part of the *res gestæ*. Had the State given in evidence a part of his conversation, then the defendant would have been entitled to have proved the whole of the conversation had at the same time in reference to the same subject-matter.—1 Greenl. Ev. § 201. But such was not the case before the court. No part of what the prisoner had stated to the witness was deposed to by her, and it was, as we have said, merely alluded to at the request

of the prisoner as a reason for propounding the question by the witness. This view disposes of the 5th assignment of error.

6. It appears that upon the examination of one Edwards as a witness on the part of the prisoner, he stated that on the morning before the shooting, he had left the house of the prisoner in company with him, and as they were travelling in the direction of the house of the deceased, "the prisoner mentioned to him the fuss which had occurred the day before," and the counsel desired the witness to detail the whole conversation had at that time in regard to the difficulty. This the court refused, and decided that no portion of the declarations of the prisoner had gone to the jury, so as to render the conversation sought be elicited legitimate, and refused to exclude that portion of the conversation relating to the difficulty. The decision of the court upon this point constitutes the 7th asassignment of error. Had the counsel for the prosecution remained silent and permitted the witness without objection to detail a portion of the conversation, such portion as he deemed made against the prisoner, we do not think it would have been permissible for him to have cut short the examination at this point, and to have availed himself of such partial statement as evidence against the deceased. It is manifest that in this way great injustice might result from garbled statements deposed to by witnesses, which, when explained by the remaining portion of the conversation, would become harmless. It is the right of the counsel for the State, to object and arrest the witness in his evidence as to the declarations of the prisoner, which are not evidence when offered by himself, but in such case, it would be the duty of the court to see that injustice was not done by permitting a partial or imperfect account of such declarations to be retained as evidence to the prejudice of the party offering them. If the prosecution insisted upon the portion already detailed, he thereby makes the evidence his own, and justifies the court in permitting the whole of the conversation to be proved. On the other hand, it is his clear right to move their total exclusion.—In this case however, it is insisted by the counsel for the State that no declarations in respect of the difficulty had been proved, and that the prisoner merely mentioned the "fuss"—that is, the conversation turned upon that subject, but what was

said upon it was not stated. Hence he insists that the State had the right to retain the evidence, that he mentioned the difficulty without opening a door for the proof as to the manner in which he made allusion to it. Taken in connection with the other testimony and the situation and conduct of the prisoner at the time he made mention of the difficulty, it cannot be denied but that the bare mention of the subject was a strong circumstance in the cause. The evening before the deceased was shot, he and the prisoner having had a difficulty, the prisoner made a threat that between the setting of the sun on that evening and its rising on the next day, he would kill the deceased. On the next morning, the sun having just risen, he was on the road which led to the house of the deceased, armed with his gun. Just before the shooting, and as the witness left the prisoner, he mentioned the difficulty which had taken place the day before. What is the effect of this declaration? Its obvious tendency was to induce in the minds of the jury the belief that the prisoner remembered the threat that he had made—that it was in his mind, and constituted the object of his visit. It is thus connected with the fact of his going in the direction of the residence of the deceased, and with the firing of the gun, which took place in a few minutes afterwards. As the declaration or statement of the prisoner, "mentioning the fuss," unexplained, was calculated to operate to his prejudice, we think it should have been excluded from the jury, or the entire statement or conversation upon that subject had at the same time should have been submitted to them.—2 Phil. Ev. C. & H. notes, 223 to 230; Greenl. Ev. § 201, 202. If mentioning the difficulty was considered by the prosecution as proper evidence for the jury against the prisoner, it was the right of the latter to show how it was mentioned, as explanatory of the circumstance arrayed against him, and what language the prisoner used in mentioning it. This position is so obvious as to require no argument to sustain it.—9 Yerg. Rep. 280, 281; 5 Mod. Rep. 165. The court did not err in refusing to permit the accused, after the State had given in evidence his declarations, proving threats against the deceased, to prove that in a subsequent conversation at a different time, not had with the deceased, or in his presence, but with a third party, he retracted the threats. The allow-

ance of such declarations violates the rule above alluded to, that the party's own declarations, not forming part of the *res gestæ*, and no part of which has been insisted on by the opposite side as evidence, cannot be allowed to be proved in his favor.—Bradford v. Bush, 10 Ala. Rep. 386. We might here close this opinion, but as there are other questions presented by the record before us, and which will doubtless arise upon another trial, it becomes our duty to settle the law in respect of them.

7. The plea of insanity was insisted on for the prisoner in the court below. In support of this defence, he proved that in 1825, he was a healthy man, and then resided in Washington county in the State of Georgia; that in 1829 he became paralized, losing the use of one half of his person; that he remained in this condition under medical treatment for about eight months, and slowly recovered; that about the year 1830, he became very intemperate in the use of ardent spirits; that in 1835, he was accidentally shot through, and was again prostrate from this cause a number of months; that from these combined causes, his conversation became incoherent, his countenance changed, and his conduct was accompanied with restlessness, and extraordinary attitudes and motions—with attempts to spit without expectoration, and with uncommon groans, hollowing, and night mare; that he also expressed a belief that the deceased was about bringing a lewd woman from Columbus, in the State of Georgia, into the neighborhood. It was further proved, that a few years before the killing took place, the prisoner had been afflicted with fits, and that a week preceding the killing, he had several more in the presence of one Edwards, who was introduced as a witness and testified as to the manner in which they affected the prisoner. The prisoner's counsel desired this witness to state what kind of fits they were which the prisoner had, and the witness not being a medical man, the court refused to allow him to answer the question. We suppose the counsel desired the witness to give a name to them, as the peculiar manner in which they affected the prisoner was allowed to be proved. This the witness was incompetent to do. There was nothing peculiarly within the knowledge of the witness which enabled him to arrive at a more correct conclusion than the jury as to the pa-

thology of the disease. Whether it was *delirium tremens*, induced by the excessive use of intoxicating liquors, or the result of the suspension of the cerebral functions, usually, I believe, denominated apoplexy, or were epileptic in their character, are inquiries which, so far as they were important, could as well have been determined by the jury as the witness, and were for this reason properly excluded. Such evidence does not come within any of the exceptions to the general rule, that opinions of witnesses, not experts, are not to be received as evidence.

As to what shall constitute evidence of insanity *at the time* of the commission of the offence, is often a delicate and perplexing question. In this case, there was some evidence adduced *tending* to show that the party at the time he killed the deceased was laboring under mental aberation, and the question was presented in the court below whether the acts and declarations of the prisoner on the day after the killing took place, evincing insanity at the time of the homicide, could be given in evidence. The court ruled that neither the prisoner's acts nor declarations, *after* the alleged offence was committed, could be received as evidence of insanity *at the time* the act was done. In this view we think the judge clearly mistook the law. Insanity, or a diseased state of the mind, must be proved to the jury, like other diseases, or facts, and it is laid down generally, that evidence of the state of his mind, both before and after the act done, is admissible.—2 Greenl. Ev. § 371. In Grant v. Thompson, 4 Conn. Rep. 203, 208, it is stated as the invariable practice to go into a connected history of the supposed lunatic's mind, both before, at, and after the act, for which he is sought to be charged, in order to arrive at his precise mental condition at the moment.—See also Dickinson v. Barber, 9 Mass. Rep. 225; Kinnie v. Kinnie, 9 Conn. Rep. 102. A diseased mind, like a diseased body, must be judged of from its symptoms. In the language of a modern writer upon the subject, "the malady assumes so many forms and exhibits itself in such *Protean* shapes, that it is out of our power to give any thing bearing the semblance of a correct definition of the disorder,"—Winslow on Ins. 69—yet it has its peculiar characteristics and symptoms from which we are to determine its existence and the nature and extent of it.

These, in the nature of things, must consist of the acts and declarations of the party, coupled with his appearance, and physical condition. Proof that a man is deranged to-day is not conclusive that he was in the same condition yesterday. The force of such testimony depends much upon the causes which produced the disease, and its nature and character, as well as the proximity of the diseased mental *status* to the act with which it is sought to be connected. The jury, however, are the appropriate judges of the weight which should be attached to such evidence. But it is said that although the authorities are numerous applying this rule in civil cases—for example to the acts and declarations of testators *after* making their wills, proving insanity at the time of executing them, also to the subsequent unsoundness of property warranted, so near the time of sale as to furnish a reasonable presumption as to its condition when sold, yet such proof must be confined to civil cases. That the ease with which insanity may be simulated, and the difficulty of detection, is a sufficient reason for not applying it to criminal cases. This proves too much, for the same reasoning would exclude all evidence of insanity in criminal cases, since the prisoner could as well feign himself insane before, or at the time of the commission of the offence, as afterwards. We know of no such distinction, and are unwilling to make it. True, we are refered to one decision by the Attorney General, which holds that a prisoner may not prove his subsequent acts and declarations indicating insanity made after the homicide was committed by him.—State v. Scott, 1 Hawks Rep. 24. But this case stands alone so far as my examination has enabled me to discover, and is unsupported either by authority or satisfactory reasoning:—Indeed Judge Henderson, who delivered the opinion, expressed in no equivocal terms his disapprobation of it, and the same court in Norwood v. Morrow, et al, 4 Dev. & Batt. 442–451, delivered an able opinion, holding the doctrine as we have above stated it, against which, they say, they are not aware of any thing, unless it be the case of the State v. Scott, *supra*, with the reasoning of which they own they are not satisfied. Our conclusion is, that the risk of deception, which such evidence affords, while it furnishes a strong reason for narrowly scanning the proof, and for attaching to it less weight, is still no reason for

its exclusion. Less injury, however, may be apprehended from it than the Attorney General supposes, since "the jury are to determine what weight is due to it, and in all such cases they should be told that every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved, that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing wrong."—2 Greenl. Ev. § 373; State v. Brinyea, 5 Ala. Rep. 241.

Let the judgment be reversed, and the proper order entered remanding the cause, and for the safe custody of the prisoner until discharged or otherwise disposed of according to law.

ELDRIDGE *vs.* SPENCE ET ALS.

1. If a sheriff seize two slaves under execution and deliver them to his overseer, who, without securing or confining them, attempts to carry them to the county jail for safe keeping, and in doing so, one of them escape, the sheriff is liable to the plaintiff to the extent of its value.
2. Where a sheriff, by suffering a slave seized under execution to escape, has incurred a liability to the plaintiff, a subsequent levy of the execution on other property, which fails to yield enough for its satisfaction, will not exempt him from the liability.

Error to the Circuit Court of Talladega. Tried before the Hon. Thos. A. Walker.

This was a rule against the sheriff, Solomon Spence, for failing to make the money on an execution placed in his hands in favor of the plaintiff in error against one Wm. H. Moore. By the bill of exceptions the following facts are made to appear: Spence on the 2d day of August 1842, by direction of the plaintiff, levied on and took into his possession, three

slaves, as the property of said Moore, and delivered two of them to Wilson, the overseer on his plantation, to be carried to and lodged in the jail of Talladega county. The overseer was not accompanied by the sheriff, nor were the slaves in any manner confined, they being on foot, and the overseer on horseback. When they reached the jail, and whilst the overseer was dismounting, one of the slaves ran off. The overseer pursued him on foot until he was out of breath, but did not succeed in retaking him. After the escape of this slave the sheriff afterwards levied the execution on two other slaves that he had previously seized under an execution in favor of the Br. Bank at Montgomery and sold them, but they did not bring an amount sufficient to satisfy the plaintiff's execution, and the other executions in the sheriff's hands. The court gave four charges to the jury, the third and fourth of which are all that are necessary to be noticed. 3d. That if they believed from the evidence that the overseer was a trusty man and had used due diligence to prevent the escape, then the sheriff was not liable: 4th, that if after the first levy and escape of one of the slaves, the sheriff levied on other property which was sufficient under all the circumstances to satisfy the plaintiff's demand, and in consequence of the sale being forbidden, when the property was offered, without the fault of the sheriff, it sold for less than its value, the sheriff was not liable.

To the charges of the court the plaintiff excepted and now assigns them as error.

White & Parsons, for the plaintiff:

1. When property is once seized by the sheriff he has a special property in it, and he had a right to sue for it or retake it under the execution, and is answerable to the plaintiff for the value. Watson's Sheriff, 191; Easley v. Walker, 10 Ala. Rep. 671. Having levied upon property sufficient to satisfy the execution, the sheriff is bound to keep it safely, and if rescued he is liable to the plaintiff for its value.—Sly v. Finch, Cro. Jac. 514; Webb v. Bumpass, 9 Porter, 201; Sewall v. Mattoon, 9 Mass. Rep. 535; Leavitt v. Smith, 7 Ala. Rep. 183. Sheriff levying upon goods is bound for their value, and it is no excuse that they are rescued out of his hands—Clerk v. Withers, 2 Raymond's Rep. 1072; Mildmay v. Smith, Saund. Rep. vol.

3, 684, case 57; Wadsworth v. Parsons, 6 Ohio, 449; Com. Digest, tit. Res. d. 7, mar. 278, vol. 7; Bacon's Ab. Rescue, E. vol. 8, 589.

2. What was due diligence, the facts being found, was a question of law and should not have been left to the jury.

3. The second levy was illegal, and of course could bind no one not participating in it.—Cutter v. Calver, 3 Cow. 30; Arnold v. Fuller, 1 Ham. 458; Mickles v. Haskin, 11 Wend. 125; Campbell v. Spence and others, 4 Ala. Rep. 543.

RICE & MORGAN, for defendants:

1. If "*due diligence*" was used, to collect the plaintiff's money, and the sheriff acted without fault in the matter, he could not be lawfully or justly required to do more.

2. If "*due diligence*" was used it makes no difference in law whether due diligence was used by the sheriff in person or by a person selected by him to act in the premises. Walker v. Easley, 10 Ala. Rep. 671; Governor v. Gibson, 14 Ala. Rep.

3. The first three charges refer the question of due diligence to the jury distinctly, and the fourth charge refers to the jury to determine the sufficiency of the last levy, and whether the omission to make the money was without fault on the part of the sheriff—it is in strict conformity to the decisions of this court.—Governor v. Powell, 9 Ala, 36 and 83.

4. There were two levies; the one made after the escape was *on property sufficient* to satisfy the debt, which was sold, but in consequeuce of objections made at the time of the sale, it failed to bring enough, although it was worth enough.

DARGAN, C. J.—The defendant, Spence, as sheriff, levied on three slaves, the property of the defendant in execution, and delivered two of them to his overseer to be carried to the county jail for safe keeping. The slaves were not in any manner confined, and one of them escaped and has never been retaken. The overseer endeavored to prevent his escape and ran after him until overcome with fatigue. Upon this evidence the court instructed the jury, that if they believed from the evidence, that the overseer was a trusty man, and had used due diligence to prevent the escape, then the sheriff was not liable.

A sheriff is certainly not an insurer of the goods seized by him on legal process, whether final or mesne, and if they are lost or destroyed without neglect on his part, he cannot be held responsible for their value; as if a chattel die, or goods be burnt without his neglect or fault, he cannot be held liable for them.—Jenner v. Joliffe, 6 Johns. 12; Brownery v. Hanferd, 5 Hill, 588; Bridges v. Perry, 14 Verm. 262. But if the sheriff does not use due diligence to secure the goods and preserve them from waste or destruction, he must be held liable for their value. If he levy on slaves or cattle and suffer them to remain in such a condition that they may escape from him, if they will, when he had the power so to secure or confine them that they could not make their escape, he must be held liable, for the escape was owing to his neglect. He had the power to secure them so that they could not escape, but he omitted to do so; this omission is neglect, for which he is responsible. Guided by these rules, we are clearly of the opinion that the sheriff is liable for the escape of the slave. He places two under the charge of the overseer, to be conveyed to the county jail—they were not confined in any manner, but could escape if they thought proper, and one did escape. The sheriff must therefore be held liable for his value, for he could have so secured him as to prevent his escape. If the sheriff thought it necessary to confine two of the slaves in jail for safe keeping, we think he was guilty of neglect in sending them under the control of one man, they not being in any manner confined or restrained of their liberty. But there is still another reason why he should be held liable. The levy gave him a special property in the slaves, and vested title in him, subject, however, to be defeated upon the payment of the money due on the execution. He may yet reclaim the slave, if he can be found, but there is no evidence whatever that any effort has ever been made to regain the possession of him. In the absence of all proof that the sheriff has used any effort to recover possession of the slave since his escape, we are forced to the conclusion, that he has been guilty of neglect. Ordinary diligence required him soon after the slave had escaped, to use all reasonable efforts to retake him, and certainly he must be held liable for the want of ordinary care. As the evidence cannot excuse the sheriff, the court should have

instructed the jury, that he was liable for the value of the slave, for taking every fact to be true that the testimony tends to prove, and still they afford the sheriff no protection against the demand of the plaintiff. Nor can he claim to be exempted from liability because he afterwards made a further levy on two slaves that he had previously levied on by virtue of an execution in favor of the Branch Bank at Montgomery. These two slaves did not yield more than enough to pay the debt due the Bank. The plaintiff's debt therefore remains unsatisfied, without any fault of his, and he is entitled to the value of the slave that escaped from the sheriff in satisfaction of it.

The judgment must be reversed, and the cause remanded.

CHILTON, J., not sitting.

WARREN, EX'R, *vs.* RIST, ADM'R.

1. Where a *scire facias* to revive a judgment recites that B. W. in his life time, "under the style and description of B. W., administrator of all and singular the goods and chattels, rights and credits of E. J. C., deceased," recoverd a judgment, &c., it cannot be intended that the judgment was recovered by him as administrator, but the words "style," &c. must be regarded as descriptive merely.
2. Under the act of 1821, (Clay's Dig. 227, § 30,) the administrator *de bonis non* of an estate is the proper person to revive and enforce a judgment belonging to the estate, and recovered in the name of the deceased administrator in chief.

Error to the Circuit Court of Barbour. Tried before the Hon. Geo. Goldthwate.

BUFORD, for plaintiff.

SAYRE, for defendant:

1. The only question presented on the record, is as to the right of the executrix of an administrator to revive by *sci. fa.* a judgment obtained by the testator in his representative character.

2. The executor of an administrator does not represent the first intestate—2 Sand. 720, note; 2 Tidds Pr. 1118; 2 Blac. Com. 506; Dunham v. Grant, 12 Ala. 105; 7 ib. 478; 6 ib. 579; the demurrer was therefore properly sustained.

PARSONS, J.—The plaintiff in error, as executrix of Burris Warren deceased, brought her *sci. fa.* in the Circuit Court of Barbour, to revive a judgment which her testator had recovered against Edward Warren, who died pending the suit, and it was revived *against* his *administrator* Calvin Rist. The *sci. fa.* recites that Burris Warren, in his life time, in his action of assumpsit, "under the style and description of Burris Warren, administrator of all and singular the goods and chattels, rights and credits of Edwin J. Cole deceased," recovered a judgment against said Edward Warren, &c. The defendant below demurred to the *sci. fa.* and the demurrer was sustained. It was sustained, as we infer, upon the ground that the representative of Burris Warren deceased could not proceed to revive a judgment, which he, Burris Warren, had recovered as an administrator. But we think it does not legally appear by the *sci. fa.* that the judgment was recovered by him as administrator. The *sci. fa.* states that he brought the suit by the style and description, &c., but this, according to the authorities, was merely a description of the person. King & Clark v. Griffin, 6 Ala. Rep. 387; 1 Chit. Pl. 253. If in truth he recovered the judgment as administrator, and if it continued to be assets of the estate of his intestate, that fact should have been pleaded. In this mode, the question could have been tried.—Dunham v. Grant 12 Ala. 105; Harbin v. Levi, 6 Ala. 390. The judgment must be reversed upon this ground, but it is probable that the question will arise in the further progress of the cause in the Circuit Court, which was doubtless the real ground of sustaining the demurrer. If it should be pleaded that Burris Warren recovered the judgment as administrator, &c., that will present the question whether the debt due to his intestate's estate and the right to control it belongs to the personal representative of the first administrator, or to the administrator *de bonis non* of his intestate, Mr. Cole, if either. This precise question is now for the first time, so far as we are aware, to be settled in this court. It appears

that at common law an administrator *de bonis non* could not have a *scire facias* upon a judgment obtained by the original executor or administrator, for he comes paramount the judgment and is no party thereto.—1 Williams on Ex. 583; Snape v. Norgate, Crown Cases, 167. But this was altered in England by statute, and we think it is altered here by our statute of 1821, which says:—"Where any suit may have been commenced on behalf of, or against any personal representative, or representatives of any testator or intestate, the same may be prosecuted by or against any person or persons who may afterwards succeed to the administration or executorship; such person or persons may, at any time, be made parties on motion, and the same shall proceed in the same manner, and judgment therein be in all respects as effectual as if the same were prosecuted by or against the parties originally named. Where any personal representative or guardian shall be displaced, all moneys due to him or her in such right, by execution or otherwise, shall be paid to his or her successor." Clay's Digest, 227, § 30. If this statute were taken literally it would not extend to the case of a judgment recovered in the life time of the first representative, and the last part of it seems to make a distinction between deceased and delinquent representatives. This distinction is frequently made by our statutes, and has led to decisions which require some scrutiny to be distinguished from the present, which is the case of a deceased administrator, who may have been in no fault. But before we come to the distinction suggested in the above cited act, we find language so general as certainly to include the successor of a deceased administrator, and this leaves but the single question, whether the act extends in such case to a suit after judgment in favor of the first administrator. Without going further, we can perceive in the above recited act a purpose to pass the choses in action of a representative, as such, to his successors, and this is so in all cases. If we carry out this design of the Legislature, we must construe this statute more with a view to its object than to its letter. The Legislature was aware, that at the common law, a judgment recovered by an administrator could not be enforced by an administrator *de bonis non* of the same estate. They were also aware of the English statute, which enabled the administra-

tor *de bonis non* to do this. They were aware too of the loss and inconvenience which the English statute prevented; and we think our Legislature intended to produce the change which was accomplished by the English statute, although the language adopted is far less clear. We conclude, therefore, that an administrator *de bonis non* may become a party to the proceedings in such cases, as well after as before judgment, in the manner prescribed by the act.

Let the judgment be reversed, and the cause remanded.

EVANS *vs.* FEARNE, CRENSHAW & CO.

1. A simple power from a principal to his attorney, authorising him to confess judgment in favor of a third person, which is unsupported by a consideration and is not given as a security for a debt, or to render a security effectual, until executed, is revocable at the pleasure of the principal.

Error to the Circuit Court of Morgan. Tried before the Hon. Sidney C. Posey.

The plaintiff in error executed a power of attorney, of which the following is a copy: "Know all men by these presents, that I, Nathaniel Evans, of the county of Morgan and State of Alabama, do hereby constitute and appoint Benjamin A. Philpot or Thomas Price, they or either of them, my true and lawful attorney or attorneys, for me and in my name to confess judgment, at the April term 1849 of the Circuit Court of Morgan county, for the sum of thirteen hundred and twenty-five 46-100 dollars on a note, dated December 30th, 1847, and due one day after date, and payable to Fearne, Crenshaw & Co., and credited by payment on the — of July 1848 with $280 18, which amount appears in the copy of said note, the original being lost, sworn to by J. J. Donnegan—the said judgment to be confessed in favor of said Fearne, Crenshaw & Co. Hereby ratifying all that my said attorney or attorneys may do in my name in the premises. In testimony whereof,

I have hereunto set my hand and seal, this 6th October 1848. —Nathaniel Evans." The matters set out in the bill of exceptions appear in the opinion of the court.

Wm. Cooper, for plaintiff in error.

Edwin R. Wallace, for defendants:

1. A power of attorney is not revocable when it constitutes part of a security for money, or is necessary to give effect to such security, or when it is given for a valuable consideration. 2 Kent's Com. 505-7, 1st edit., and references; Tidd's Practice, 495.

2. If a power of attorney is revocable at all, for alleged error, the result would be, as in this case, that for a supposed trifling error, the whole debt would be postponed.

3. If an error can be noticed at all, it should be an error *clearly ascertained and established by proof.* In this case, the amount is vague, and no proof is offered.

4. Continuances are in the discretion of the court below, and will not be reviewed.

CHILTON, J.—The plaintiff in error having executed to Philpot and Price a power of attorney to confess judgment at the April term of the Morgan Circuit Court, in favor of Fearne, Crenshaw & Co., for the sum of $1325 46, on a note dated December 30th, 1847, appeared in court, when the judgment was about being confessed, and resisted its confession. He also introduced his written revocation of the power under his seal, which had been previously shown to his said attornies, and notice of which they had acknowledged. He further made an affidavit, the substance of which is, that in making the settlement so as to arrive at the amount due Fearne, Crenshaw & Co., and for which he had given the note specified in the power of attorney, a mistake had intervened for above the sum of one hundred dollars to his prejudice, and he thereupon prayed a continuance of the cause. The court refused to continue the case, or to consider the power of the said agents revoked, but permitted the judgment to be confessed by them for the sum of $1089 64, *balance due on said note in the power of attorney named, besides the further sum of*

sixty-eight 79-100 *dollars damages by way of interest, and the costs,*—which judgment was rendered in favor of Thomas Fearne, Ashley Crenshaw, James J. Donnegan, and William P. Atwood, merchants and partners, trading under the firm name of Fearne, Crenshaw & Co.

The general rule is, that the principal may annul or revoke the authority of his agent at pleasure. This of course is not gainsaid, but it is insisted that the power of attorney under and by virtue of which this judgment was confessed forms an exception to the rule, and that it was given as a security for money, or rather, is coupled with an interest, which renders it irrevocable. Did the instrument come within the category supposed, then it is clear it would not be revocable, but we cannot perceive how it can, unaided by extrinsic proof, be considered as coupled with an interest, or as a security for money. The authorities to which we are cited by the counsel for the defendants in error show that a *warrant of attorney* to confess a judgment is not revocable, and in such case, it is said, the court will grant leave to enter up the judgment, though the party does revoke it, (Bacon's Abr., Attorney, E.; Odes v. Woodward, 2 Lord Raym. 849; Tidd's Pr. 495); and were the instrument under which this judgment was confessed a warrant of attorney, then we should hold it not revocable. But it is not, in the sense in which such instruments are irrevocable. A warrant of attorney, strictly so called, "is an instrument in writing, addressed to one or more attornies, therein named, authorising them generally to appear in any court, or in some particular court, on behalf of the person giving it, and to confess judgment in favor of some particular person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error, or file any bill in equity, so as to delay him. This general authority is usually qualified by reciting a bond, which commonly accompanies it, &c.; and such instrument is given to the creditor as a security, and consequently is not revocable.—Bouv. Law Dic., War. of Atto.

The power of attorney before us is but a simple authority conferred by the plaintiff in error upon Philpot and Price to confess judgment, and before they exercised it, the party revoked the power. It is not shown that it was executed upon any consideration, or that it was given as security for any de-

mand, or to render a security effectual, and we think falls under the general rule of revocable powers. Walsh v. Whitcomb, 2 Esp. Rep. 565, is an instance of the execution of a power as part of a security. Walsh had assigned all his effects to one Barker, to whom amongst others he was indebted, and executed to him a power of attorney to collect the debts for the benefit of the creditors, with the power to appoint a substitute to act in his stead. He did appoint one, to whom Whitcomb paid the demand which he owed Walsh, and which passed by the assignment. Subsequently, however, to the assignment, but before the payment, Walsh appointed one Hindley his agent to collect these claims, who demanded payment of Whitcomb of the same demand he had paid to the substitute of the agent Barker. Lord Kenyon said, "There is a difference in cases of powers of attorney. In general, they are revocable from their nature, but there are these exceptions: Where a power of attorney is part of a security for money, there it is not revocable; where a power of attorney was made to levy a fine as part of a security, it was held not to be revocable; the principle is applicable to every case where a power of attorney is necessary to effctuate any security—such is not revocable."—2 Kent's Com. 643-4 (marg. page.) So it seems that to fall within any exception to the general rule, the power must constitute part of a security for money, or must be necessary to give effect to such security, or must have been given for a valuable consideration. The ground of this rule, which governs the exceptions, is, that a party ought not to be allowed to violate his solemn engagement, or to render ineffectual a security he had created, for that would enable him by his wrongful act to perpetrate a fraud on innocent persons, who have relied with implicit confidence upon him, which would be against the clearest principles of equity and justice.—Story on Agency, § 477.

In this case, however, as we before remarked, there is no consideration—no delay of suit contracted for upon the original demand. It is not even shown that the creditor is placed in any worse condition in consequence of relying upon the authority thus confered. It is but a simple power to two persons to confess judgment in favor of a third, disconnected from all negotiation between the debtor and creditor, and not shown

to have been supported by any consideration. Our conclusion is, that it furnished no warrant for the judgment rendered by the court below, and it must therefore be reversed.

PARSONS, J., not sitting.

JENKINS' DISTRIBUTEES *vs.* JENKINS' ADM'RS.

1. Where, on the application of an administrator for final settlement, the court orders publication "for three consecutive times," &c., and the decree recites that it was so made, it cannot be intended that publication was made for *three consecutive weeks*, as required by the statute, and the decree is consequently erroneous.
2. A guardian *ad litem* for infant distributees should be appointed a sufficient length of time before the day of final settlement to enable him to examine the accounts filed by the administrator; and the record should not only show the appointment, but his acceptance of the trust, —otherwise the decree will be reversed.

Error to the Orphans' Court of Benton. Tried before the Hon. Jas. L. Lewis, Judge.

THIS was a proceeding for the final settlement by the defendants in error of their administration of the estate of Owen Jenkins, deceased. At the time the order of publication was passed, James Crow was appointed guardian *ad litem* for the infant distributees, but it does not appear that he was notified of the appointment or ever accepted it, and on the day of the final settlement another appears to have been appointed in his stead. The remaining facts necessary to a full understanding of the case will be found incorporated in the opinion of the Court.

RICE, for plaintiffs in error, cited The Legatees of Horn v. Grayson, 7 Port. 270; Douthitt v. Douthitt, 1 Ala. Rep. 594; Taylor & Wife v. Reese, 4 ib. 121.

J. B. MARTIN, for the defendants.

DARGAN, C. J.—There are many objections made to the regularity of this decree, but we shall examine only two.—The first is, whether the publication that was ordered and shown to have been made was sufficient. The act of 1843, under which the proceedings were had, makes it the duty of the Orphans' Court, when an executor, administrator or guardian files his accounts for settlement, to order publication to be made for at least forty days, either by posting up written notices at the door of the court-house and at three or more other public places in the county, or by advertisement for three consecutive weeks in some newspaper, as the judge shall direct. —Clay's Dig. 229. On the day the accounts were filed in this case and application for a final settlement was made, the judge made an order, "that the first Friday in July then next be set for hearing the application, examining the accounts, and making the final settlement, and that publication be made in the Jacksonville Republican for *three consecutive times*, and at least forty days previous to the day appointed for the final settlement." The recitals in the final decree show that notice had been given in the Jacksonville Republican for *three consecutive times*, at least forty days previous to the day of settlement. The notice required by the order and the notice given was publication in the Jacksonville Republican for three *consecutive times;* but the notice required by the statute to be given, when it is published in a newspaper, is *publication for three consecutive weeks.* We cannot hold this to be a legal notice. We cannot say that publication for *three consecutive times* means publication for *three consecutive weeks.* If we could presume that the Jacksonville Republican means a newspaper by that name, we know not how often it is published, nor do we know whether publication was made for three consecutive weeks from the language employed to describe the publication that was given. As the record does not inform us whether the notice to the parties in interest was given in the manner directed by the act, we are compelled to hold the decree erroneous.—Willis, adm'r, v. Willis' Distributees, decided at the present term.

By the act before referred to, it is made the duty of the Orphans' Court to appoint guardians *ad litem*, if there be minor distributees, in order to protect their rights. *When* the guar-

dians shall be appointed, however, is not prescribed by the statute. We think the correct practice would be to appoint the guardian *ad litem* a sufficient time before the day of final settlement to enable him to examine into the accounts filed by the administrator. As the act was passed by the Legislature, no doubt, under the impression that the interests of the minors required that some one should be appointed to supervise on their part the accounts of the administrator, the courts should not adopt a practice that would render the act nugatory. To appoint a guardian *ad litem*, therefore, on the day of the final settlement, and then require him to proceed immediately with it, would be improper. Perhaps it would be the better practice to appoint the guardian *ad litem* at the time of ordering publication to be made. It must, however, be left to the discretion and judgment of the Orphans' Court, when the appointment shall be made and who shall be appointed guardian *ad litem*, but that discretion should be so exercised as to afford all the protection to the interest of the minors designed to be given by the act. The appointment of Crow as guardian in this case was certainly made in due time, but whether he ever accepted the trust, assented to the appointment, or was even notified of it, is not shown by the record. The record should not only show the appointment of a guardian *ad litem*, but also that he accepted the office. If we could not gather from the record that the guardian accepted the office, or undertook to perform the duties incident to the appointment, we should feel it our duty to reverse the decree.—Daniel v. Hannagan, 5 J. J. Marshall, 49.

The decree must be reversed, and the cause remanded.

JONES, GARNISHEE, *vs.* HOWELL.

1. The answer of a garnishee, found in the transcript and identified by the minute entry, must be regarded as a part of the record.
2. Where a garnishee denies that he is indebted to or has in his hands any effects of the debtor, and his answer is not controverted, he is entitled to a discharge, and cannot be held to answer further for a probable future indebtedness.

Error to the Circuit Court of Butler.

THE defendant in error, Samuel A. Howell, having a judgment against one Cunningham, sued out a summons of garnishment against the plaintiff in error, as administrator of Samuel Howell, deceased. The facts will be found sufficiently set out in the opinion of the court.

J. D. F. WILLIAMS, for plaintiff in error:

1. The judgment *nisi* in this case was improperly rendered by the court below, as appears by the record, because the garnishee had answered in writing, and as no objection had been made, the presumption was that all objection to it was waived. If the objection was not waived, the answer would not have been filed under the order of the court.

2. The case as presented by the answer (which not being contested must be taken as true,) is one over which a court of law has no jurisdiction.—Mock v. King, 15 Ala. Rep.

JUDGE & STONE, for defendant in error:

1. On the coming in of the answer of the garnishee, the cause was continued for "*further answer.*" Subsequently, a judgment *nisi* was rendered, garnishee being in default—a *scire facias* was issued and executed, and the judgment *nisi* made final. The cause then stands in a legal aspect, as though no answer was ever made or filed, and the judgment final was rendered *not on the answer*, but *for the want of an answer* The answer then cannot be looked to in this court, and the judgment below must be affirmed. *The further answer*, had it been made, might have shewn a state of facts which would have authorized the judgment rendered.

PARSONS, J.—The garnishee answered in writing, and it is clear from the minute entry, that the answer at length was made part of the record. It can, therefore, be regarded as such.—Gaines v. Bierne, 3 Ala. Rep. 114; Fortune v. The State Bank, 4 Ala. Rep. 385. The truth of the answer was not denied, but it was treated by the plaintiff in the garnishment as a true answer. The garnishment is sued out against Jones, the plaintiff in error, as the administrator of Samuel Howell, deceased, suggesting that the plaintiff in error, as such

administrator, was indebted to Cunningham, the defendant in a judgment, or had effects of his in his hands. The allegation is denied by the answer, but it admits that Cunningham's wife is one of several distributees of the estate of said Howell, and admits that there were lands belonging to the estate, and that it had about five thousand dollars in notes given for the sale of property, in the hands of the plaintiff in error, as administrator, but that this was the whole of the estate. The answer further states that the time allowed for the presentation of claims against the estate had not elapsed, and that there had been no settlement of the estate by the Orphans' Court, and of course no decree ascertaining the distributive share of Cunningham's wife.

The court below refused to discharge the garnishee upon this answer, but continued the cause for further answer, because the answer showed "probable future indebtedness." And the court finally, on *sci. fa.*, rendered judgment against the garnishee for failing to answer concerning the probable future indebtedness.

In Mock v. King, 15 Ala. Rep. 66, it was held, that the undivided interest of a distributee of an estate, in the hands of an administrator, is not subject to the process of garnishment. Hence, according to the state of facts as shown by the answer, and which was not controverted by the plaintiff in the garnishment, the garnishee ought to have been discharged. But he was required to answer further as to probable future indebtedness. This clearly related to the matters stated in the answer, and the order was made, probably, under an impression that the money owing by the notes would be collected, and that there would be a final settlement and decree of distribution, whereby the wife of the defendant in the judgment might become entitled to a distributive share of the estate. As the answer was taken as true, according to the existing condition of the estate, no better result could have come from a further answer as to probable future indebtedness to arise out of the existing state of things. Now, if the further answer had been made and had admitted future indebtedness in this way, that could not have been subjected under the present garnishment. The Branch Bank at Mobile v. Poe, 1 Ala. Rep. (N. S.) 396; Hazard v.

Franklin, 2 ib. 349. A garnishment is in the nature of a suit and the statute prescribes a time for the garnishee to answer, with which the plaintiff in error complied. If it were conceded (rather contrary to the last mentioned cases) that the garnishee must discover his indebtedness to the time of his answer, it does not follow, that having duly and fully answered, he can be held to answer further for a probable future indebtedness. That is certainly beyond the letter and spirit of the statute, and for this error the judgment must be reversed, and the garnishee discharged. It is not necessary to enquire whether or not the distributive share of the wife of the defendant in the judgment could be taken from her for his debts in such a case. Let the plaintiff in error recover of the defendant the costs of this court and of the court below.

LOCKE *vs.* GARRETT.

1. Trover lies against an executor for a conversion by the testator in his life-time.
2. L., as sheriff, seized the property of G., and, refusing to surrender it on demand, sold it under executions against H., and, by direction of H., paid over the surplus, left from the sale after satisfying the executions, to G. as his agent: *Held*—That in an action of trover by G. against the executor of L., the surplus, thus paid over, cannot be allowed to go in reduction of damages.

Error to the Circuit Court of Greene. Tried before the Hon. Geo. D. Shortridge.

This was an action of trover by the defendant against the plaintiff in error, as executor of James C. Locke deceased, for the conversion by the latter in his life time, he being the sheriff of Greene county, of certain slaves, the property of the said defendant in error. The facts are sufficiently detailed in the opinion of the court.

J. B. Clarke, for plaintiff in error:

1. That the action of trover is an equitable action, in which justice can be administered according to the principles of

equity.—McGowan v. Young, 2 Stew. & Por. 171; Baldwin v. Porter, 12 Conn. Rep. 473; same case, Sedgwick on Dam. 519, and 2 U. S. D. 10, § 211.

2. A sale by a sheriff confers no title to the property sold where the defendant in execution had no title.—8 Ohio Rep. 369; 7 Eng. Com. L. Rep. 272.

3. Where there is a sale by the sheriff of the property of one, under an execution against another for the debt of the latter, and a surplus left in the hands of the sheriff, such surplus does not belong to the defendant in execution, but to the owner of the property.—Taylor v. Williams, 1 Ired. L. Rep. 249; Wheeler & McCurdy v. Kennedy, 1 Ala. Rep. N. S. 292; Douglass v. Wallace, 11 Ohio Rep. 42; Watson on Sheriffs, 83; 7 vol. Law Lib.

4. And should such owner voluntarily surrender such surplus money to the defendant in execution, he the defendant disclaiming all title to the property from the sale of which such surplus accrued, the owner cannot be permitted to recover for such surplus in action against the sheriff.

5. A man cannot be principal and agent at the same time, nor, as agent for another, become the purchaser of his own goods for such other; consequently when as agent of a defendant in execution, he receives a surplus of the sheriff over satisfying an execution produced by the sale of his own property by such sheriff, he holds such surplus not as agent for the defendant in execution, but as his own money.

6. And should he place himself in the relation of agent to the defendant in execution in regard to such surplus, and it be decided that by such act he could not question the right of his principal, it would be his own folly, and a waiver of all right to recover therefor of the sheriff.

ERWIN, *contra.*

CHILTON, J.—1. The statute declares that the action of trover shall survive for and against executors and administrators.—Clay's Dig. 313; Nettles, adm'r v. Barnett, 8 Porter's Rep. 181; 1 U. S. Dig. 63. We think the action maintainable against the executor. But this point is not urged by the counsel for the plaintiff in error. At the common law we

concede the action would not lie against an executor for a conversion by his testator.—2 Saund. Pl. 886.

2. It appears that the sheriff seized and sold the property of the defendant in error, who was the plaintiff below, upon an execution against one James S. Hemphill; that he was informed in writing by Hemphill, that the slaves did not belong to him, but was requested to sell them, and to pay the overplus, after satisfying the executions in his hands against Hemphill, to the plaintiff, Garrett, whom he authorised to receive and receipt for the same as his agent. There remained after satisfying the executions against Hemphill, the sum of $440 67. For this sum the defendant below, who was the executor of the sheriff, produced and read the receipt of said Hemphill, signed by William Garrett, the plaintiff, said receipt reciting that it was the balance of the money upon the sale of the slaves now sued for, which were sold as the property of said Hemphill.

The court was asked by the counsel for the defendant to charge the jury, that the measure of damages was not the value of the slaves, but the price for which they were sold at the sheriff's sale, and compensation for their use while in the possession of the sheriff, deducting the surplus paid over to the plaintiff under the foregoing receipt, which charge the court refused to give so far as the surplus was concerned, but ruled that the defendant, in the estimating of the damages, had no right to have the surplus deducted, provided the jury should believe that he received the same merely in the capacity of agent for Hemphill. The defendant then asked the court to charge, that the plaintiff could not have been the agent of the defendant in execution to receive the surplus of the proceeds of the sale of his, the plaintiff's own property. This charge being refused, the plaintiff in error presents them now for our consideration.

It appears that Garrett demanded the property of the sheriff before he made the sale, and at the time of sale, forbid his selling, claiming it as his own. The bill of exceptions does not inform us whether Garrett, the plaintiff, ever paid over to Hemphill the money so paid him, as the surplus arising upon the sale, but the jury have affirmed by their verdict, that the agency did in fact exist, and that he received it in that capa-

city. We would then intend, if necessary to support the judgment, that it was paid over.

Conceding that the action of trover is an equitable action, and that the equities of the parties may be investigated and determined in it, we do not think that the plaintiff in error has shown any equitable right to lessen the recovery of the plaintiff by the amount of the surplus which was paid him as agent of Hemphill. In what does this equity consist? He seized upon the property, being advised in writing by the defendant in the execution, that it was not his: It is demanded of him by the true owner, but he refuses to surrender it, and then with a full knowledge of its situation proceeds, in defiance of the rights of the plaintiff, to make a sale. The surplus was not paid to the plaintiff by the sheriff at the plaintiff's solicitation, but by virtue of instructions from the defendant in execution to pay the same to him, as agent of said defendant. This operated then a payment to the defendant, Hemphill, whose receipt by his authorised agent the sheriff held. How then can he, or his executor, be heard to say that the plaintiff could not become an agent, since he fully recognised his agency, and made the payment to him as such, according to the written order of Hemphill? But we think it very clear after the plaintiff had demanded his property, and the sheriff refused to give it up, his right of action immediately accrued for the conversion. He was not bound to protect the sheriff in retaining money, which the sheriff paid him for another, with a full knowledge of the facts under which such payment was made, nor can the sheriff, upon any recognized principle of equity, cast upon the plaintiff, to whom he paid as agent, the burden of litigating with his principal the right to the money, merely for his (the sheriff's) indemnity.

In this case, the plaintiff chose to rely upon the sheriff's liability to him for the conversion of the slaves sued for, which conversion was complete upon the refusal of the sheriff to give them up to him on his demand. He might well then have done as he did, rely upon this right of action for his indemnity, and treat the property as the sheriff's. On the other hand, he could have elected to pursue the property and sue the purchaser, had a third person purchased, in detinue or trover, or after the sale and receipt of the money by the sheriff,

have brought his action of assumpsit, for money had and received, and have recovered the price—although he might have recovered the surplus, he was not bound to do so, neither was he bound to hold on to it and thus violate the trust in virtue of which he received it by a refusal to pay it over. We think his original right of action remained wholly unimpaired by his subsequent conduct, and that the ruling of the Circuit Court was strictly correct.

Let the judgment be affirmed.

CRUTCHFIELD *vs.* WOOD.

1. If a collector, before demand or notice, pays over to ths treasurer taxes, received by him under color, but without authority of law, such payment will discharge him from all liability to the party by whom they were paid.

Error to the Circuit Court of Benton. Tried before the Hon. J. J. Woodward.

This was an action of assumpsit by the plaintiff against the defendant in error to recover from him a sum of money, which the defendant, as tax collector of Benton county, had in the years 1846 and 1847, collected from him, without authority of law. By the bill of exceptions it appears, that the plaintiff was a non-resident, owning slaves in this State, and that the defendant collected as a tax upon these slaves an excess of $43 25 in 1846, and of $42 45 in 1847, over and above the legal assessment. It appears further that the defendant paid over the entire tax collected in 1846, including the excess, to the treasurer of the State, without demand, or notice from the plaintiff not to do so, but that he received notice before he paid over that of 1847. The court charged the jury that under the proof, they could only find for the plaintiff the amount of the excessive tax collected by the defendant in 1847, with interest, and that they must find for the defendant as to the

excessive tax collected in 1846. To this charge the plaintiff excepted and now assigns it as error.

RICE & MORGAN, for plaintiff in error:

1. Wiley v. Parmer, 14 Ala. Rep. 627, seems to be conclusive of this case.

2. Where a person has paid money merely to avoid a distress, *e. g.* under any sort of legal compulsion, or compulsion under color of legal right, and the agent has received it under the color of process by an excess of authority, it may be recovered back, though the agent has paid it over, and no notice has been given him to retain it.—See Livermore on Agency, 2d vol. 263; Snowden v. Davis, 1 Taunton, 359; Stevens v. Goodell, 3 Metc. Rep. 34. Such a case is distinguishable from a case where there is no excessive assumption of authority and the payment is made voluntarily, or in mistake of law or fact.

J. B. MARTIN, for the defendant:

1. The general principle governing the personal responsibility of agents for private persons to third parties is, that if the agent contracted as such, believing that he had authority, and credit was given to his principal alone, he, (the agent) is not responsible.—Story on Ag. 255; Paley on Ag. 368, 369; Kent's Com. 629, 630; 15 Johns. 1; 13 ib. 58; 11 Mass. 97; 16 J. B. D. 561; Upchurch v. Norsworthy, adm'r, 15 Ala. Rep. 705.

2. As to cases where money has been paid over before notice.—See Story Ag. 303–4; Paley on Ag. 388–9; 1 Wend. 173.

3. But a more liberal principle even than this is settled as to public agents, being required in justice to them, and by public policy. The present is a case of a purely *voluntary payment*, without objection, or protest at the time, or subsequent notice that the money so paid would be reclaimed, until after the money was paid over to the State and the defendant left without indemnity. It is not pretended that there was any compulsion, fraud or deceit. The law under which the money was paid was open to both parties, and it was the equal right of both to pass upon its validity. Thus, under a

mutual mistake as to the right to collect, and the duty, the money was paid over to defendant in error, and by him paid over to the State. Under such a state of facts there can be no recovery. Story on Ag. 306-7-8-9-11; Nelson & Elliott v. Swartout, 10 Peters 137; Enloe v. Hall, 1 Humphreys 303; Gray v. Otis, 11 Verm. 628; 9 Mass. 272; Hodgson v. Dexter, 1 Cranch, 345; 1 Mass. 208.

4. The plaintiff, it is true, has a remedy, but it is against the State, and not against her agent, who has in good faith *and without objection or resistance* on the part of the plaintiff, paid over to the State.

DARGAN, C. J.—The rule of law is too well settled to admit of controversy, that if an agent receive money to which his principal is not entitled, yet if the agent pays it over before demand is made, or notice given to him not to pay it to his principal, such payment will discharge the agent from all liability.—Norsworthy v. Upchurch, 15 Ala. Rep. 705; Thompson v. Stickney, 6 Ala. Rep. 579; 7 Johns. 179; 7 Cowen, 475; Story on Ag. § 301, and cases there cited. Nor is the rule varied because the defendant is a public officer, for although money illegally obtained by public officers under color of law may be recovered back from them, if notice be given at the time of payment, or before it is actually paid over to the government by the officer, that the party paying it will claim it back of him, still if no such claim or notice be given to the officer, until he has actually paid over the money to the government, the agent receiving it cannot be held liable to the party who paid it to him.—Story on Ag. § 307.

The ruling of the Circuit Court was in conformity with law and the judgment is therefore affirmed.

PRUITT *vs.* THE JUDGE OF THE CO. COURT, &c.

1. Where the defendant in a bastardy proceeding appears before the County Court, pleads guilty to the accusation, and acknowledges himself to be the father of the child, and, in pursuance of the judgment rendered, executes a bond, which recites that the mother is a single woman, and was delivered of the child in the county wherein the proceedings were had, the jurisdiction of the court is sufficiently shown, and it is then too late to object to defects in the original complaint, or in the process of the justice of the peace.
2. The correct construction of the bastardy act is not that the father shall be compelled to support the child until it arrives at the age of ten years, but for ten years from the judgment of condemnation.

Error to the Circuit Court of Barbour. Tried before the Hon. Geo. Goldthwaite.

This was a proceeding by *supersedeas* to arrest and quash an execution, issued against the plaintiff in error on a bond executed by him in conformity to a judgment of condemnation rendered against him under the bastardy act. The facts on which the supersedeas was sued out and the grounds on which the motion to quash was made are sufficiently set out in the opinion for a full understanding of the points decided. The Circuit Court refused to quash the execution, and dismissed the supersedeas, and this is now assigned as error.

Cochran & Sayre, for plaintiff in error.

Barry, for defendant.

PARSONS, J.—The Circuit Court dismissed the supersedeas, refused to quash the execution, and gave judgment against the plaintiff in error for the costs, and these decisions of the court are now assigned for error. The plaintiff had been condemned under the bastardy act to pay fifty dollars a year for ten years for the support of the child, and had given bond and sureties, payable to the judge of the County Court. The condemnation was rendered on the 9th August 1842, and the bond executed on the same day. It appears by the judgment of condemnation, that the child was then about six years

old; that the mother, according to her complaint, was delivered in Barbour county; and that at the time of trial the plaintiff in error confessed said accusation and confessed himself to be the father of the child. It also appears by a statement in the bond, that the mother of the child was a single woman, and that the child was born in Barbour county. The execution in question was issued in October 1847, for one of the annual payments of fifty dollars secured by the bond. The plaintiff in error, by his petition, procured a supersedeas to arrest the execution, to the end that he could have it quashed; and afterwards this proceeding was transfered to the Circuit Court of Barbour, by reason of the fact that the County Court Judge had been of counsel in the cause, in which it was disposed of as already mentioned.

It is now contended that the County Court had no jurisdiction of the complaint, because it appeared by the mother's *complaint before the justice* that the child was born in Fayette county, and because, as is alleged, it does not appear that the mother was a single woman. The enactment is, that any *single woman pregnant or delivered*, &c. may complain to any justice of the peace of the county where she may be so pregnant or delivered. The complaint was made in this case in Barbour county. The justice bound the plaintiff in error to appear and answer at the County Court of that county. The bond of the plaintiff to appear and answer contains a recital that the mother was pregnant of the child in Barbour county; and his bond to pay the condemnation money states that she was a single woman, and that she was delivered of the child in Barbour county. The statute declares this bond to have the force, validity and effect of a judgment, and that executions may issue thereupon. The complaint before the justice is not required to be in writing, but when the accused appears before the justice, the latter is to examine the female, in the presence of the accused, touching the charge; and if sufficient cause be shown, the justice is to bind the accused to appear at the County Court.—Clay's Dig. 133. The questions whether she was a single woman, (as none else are within the statute,) and whether she made her complaint in the proper county, were both involved in this examination. Further—an issue is to be made up and tried in the County Court, "whether the

reputed father is the real father of the child or not." It will not be contended that the accused can now take advantage of any defect in the process issued by the justice. If it should be contended that the complaint before the justice ought, by construction, to have been in writing, still it cannot be said that it was to form a part of the issue to be tried in court. In this respect it differs from certain statutory proceedings by notice, which is to take the place of a declaration, and from the complaint in a forcible entry and detainer. Indeed, the female is not a party to the cause—she is merely the informer or witness, and she recovers nothing. We think the questions, whether or not she was a single woman, and whether or not the complaint was made in the proper county, may have been put in issue on the trial in the County Court. Looking rather to the intention than to the language of the act, we think this is a fair conclusion. It was not the intention of the act that the party complained against should be concluded upon these questions, either by the mother's complaint or by the examination before the justice of the peace, and still less by the justice's warrant. If not, it was intended that these facts might be tried in court. Assuming this to be so, the question is similar to the case of an indictment for a misdemeanor, after judgment. There, it is too late to object to the form of the original complaint, or to the process of the justice. We do not mean to say that, in general, jurisdiction in the present class of cases will be presumed after judgment, unless it legally appears that the mother was a single woman, and that she complained in the proper county. Had there been an issue, these facts might have been within it; that would have settled the question. But in this case the accused confessed his guilt, and executed the bond, which may not only be considered as the admission of the accused, and as part of the judgment according to the statute, but as the judgment itself, containing these admissions. And thus the jurisdiction appears. It will be perceived by the counsel of the plaintiff in error, that the authorities they have cited are not in conflict with the view we have taken. As this is obvious, we do not examine those authorities particularly in this opinion. We therefore have no difficulty in arriving at the conclusion, that the judgment is not void, and this without the necessity of con-

struing, as it respects its application to this kind of a case, another of our statutes, which says that "judgment on confession shall amount to a release of errors."—Clay's Dig. 321, § 51.

The plaintiff's counsel limit the construction of the bastardy act, so as to read that the father shall be compelled to support the child only till it arrives at the age of ten years; and in the next place, they infer that the execution in question was for a yearly payment which became due after the child had attained the age of ten years, and therefore improperly issued. We do not find this limitation in the act, and we cannot put such a construction upon it.

Lastly—we do not enquire whether the act limiting writs of error to three years applies to cases like the present; because, if the judgment is not void, its errors cannot be looked to in support of a motion to quash the execution.

The judgment of the Circuit Court must be affirmed.

SHAW ET AL. *vs.* THE BR. BANK AT DECATUR.

1. S., the endorser on a protested bill of exchange, held by the Branch Bank at Decatur, procured a discount of his note with a view of paying the bill, but having given no direction as to the application of the proceeds, they were placed to his credit on the books of the Bank, and some time afterwards applied by the cashier to the payment of the note, which was thereupon cancelled and delivered over to S. *Held*—That, in the absence of other proof, the note must be considered as extinguished, and no action can be maintained upon it by the Bank.

Error to the Circuit Court of Morgan. Tried before the Hon. Sidney C. Posey.

THIS was an action of assumpsit by the defendant against the plaintiffs in error on a promissory note for $1120 33, dated the 21st October 1840, and payable six months after date. By the bill of exceptions it is shown, that one Hampton, as the agent of the defendant Ephraim Shaw, took said note at the date of its execution, together with a bill of exchange for $243, to the branch of the Bank of the State of Alabama at Decatur, for the purpose of paying with them a bill of ex-

change for $1200, held by said Bank, which was drawn by one A. T. Shaw on Kirkman, Abernathy & Hanna of New Orleans, and endorsed by the said defendant, Ephraim Shaw, dated November 13, 1839, at six months after date, and which had been protested for non-acceptance, but the said bill of exchange was not taken up by him; that the said note was discounted by the Bank, and after the proceeds had remained for some time to the credit of the defendant Shaw on the books of the Bank—Compton, the cashier, applied the proceeds to the payment of the note itself, and put upon the note the mark of cancellation; that said note was subsequently delivered up to said defendant; and that a suit was instituted on said bill of exchange for $1200 against said defendant, returnable to the fall term 1842, of the Circuit Court of Morgan, on the trial of which, the said Hampton having been summoned as a witness by the defendant, to prove payment thereof by the discount of the note now sued on and the $243 bill of exchange, the said Bank took a non-suit, on the case being called and without its going to the jury. These facts embrace all the evidence. The counsel for the defendant asked three charges, the third of which was that although the note was given by Shaw for the purpose of paying the bill, the jury must find from the evidence that it was so accepted by the Bank; and if they should find that the proceeds were applied to the payment of the note itself, and not the bill, that it was evidence that the Bank did not so accept it. This charge the court refused to give, whereupon the defendant excepted and now assigns it as error.

L. P. Walker, for plaintiffs in error:

1. There is no doubt that the plaintiff in error had the right to appropriate the proceeds of the note sued on as he chose; but in order to do this, his intention as to the particular appropriation desired must have been signified to the Bank at the time of the discount. A mere *uncommunicated* intention to have the proceeds applied in payment of the bill for $1200 is altogether ineffectual. And in that case, the right to appropriate the proceeds belonged to the Bank, which could make the application either simultaneously with the discount of the note, or *at any time afterwards*.—2 Greenl. Ev. §s 529–30, 2d

edit.: 1 Am. Lead. Ca. 142, 144–5–6–7; 12 Ala. Rep. 275; 15 Wend. 19 The evidence in the cause shows that the note sued on was carried to the Bank for the *purpose* of paying the bill for $1200. But it does *not* show that this purpose was *communicated* to the Bank, and the presumption is, that it was not; otherwise, the bill for $1200 would have been taken up by the plaintiff in error, and the note now sued on would not afterwards have been cancelled and *delivered* to him.

2. The doctrine is clear, that if a creditor has once made the appropriation, whether by verbal direction or rendering an account, or by conduct inducing a reliance on a particular appropriation, or bringing suit in a way which declares the application, he is *bound by it*, and cannot afterwards *change* it. 1 Am. L. Ca. 145, 125; 4 Cranch, 317, 321; 1 Wash. 128; 2 Rawle, 316; 5 Watts, 544; 2 N. H. 193; 2 Greenl. Ev. § 532, (a.) Independent of the cancellation of the note, the specific appropriation of its proceeds is clearly established by the suit subsequently brought upon the bill for $1200.—1 Am. Lead. Cases, 143; 20 Maine 457; 23 Pickering 473. Consequently the Bank having once applied the proceeds of the note to the payment of the note itself, (of which application the plaintiff in error was notified by the cancellation and delivery of the note and the subsequent suit on the bill,) had no right afterwards to alter it. And this would be so although the maker of the note had previously directed a different application. The third charge asked was clearly right under the circumstances.

3. But even if the proceeds of the note were intended by Shaw to be appropriated to the bill, and this intention was communicated to the Bank at the time of discount, and that appropriation had been actually made by the Bank, still the cancellation and delivery of the note would be a complete discharge of the debt evidenced by it. There is no common sense in the proposition that a note which the holder has deliberately *cancelled* and given up, can still be sued upon. The *cancellation* of a promissory note *discharges* the debt.—7 Barr's Rep. 100; ib. 251.

Wm. Cooper, for defendant:

1. The defendant below had the right to have such an ap-

propriation of the proceeds of the note as he chose, if his intention was made known to the Bank at the time the note was discounted, and the Bank could not apply them otherwise than as he directed.—2 Greenl. §§ 529, 530; 12 Ala. Rep. 275; 15 Wend. 19; 2 McCord, 292; 5 Watts, 544; 2 Har. & Gill, 159; 4 Mass. 692; 17 ib. 575; 10 Pick. 415; 12 ib. 463; 7 Wheat. 13.

2. The note was discounted for the express purpose of paying the bill, and the mistake of the cashier in applying the proceeds to the payment of the note and cancelling it cannot, under the circumstances, amount to a payment of the note. The Bank was bound to apply the proceeds to the bill.—Reed v. Boardman, 20 Pick. 441; Dewey v. Bowers, 4 Ired. 538; Morehead v. West Branch Bank, 3 Watts & S. 550; 12 Vt. 608; 13 ib. 15. The defence set up by Shaw to the suit upon the bill is conclusive to show, that the application of the proceeds by the cashier was without his assent, and that he meant to insist upon its application in accordance with the purpose for which it was discounted. Having defeated that action by that defence, he cannot now say that the note is paid. 2 Porter, 401; 2 Stew. 498; 13 Ala. 353; 17 Mass. 575.

3. Other things being equal, the law applies payments to the oldest debt.—9 Wheat. 720; 9 Watts 386; 9 Shep. 138.

4. It does not appear that the note was due when the cashier made the application of the money, and the parties to the note and bill were not the same.

CHILTON, J.—It appears in this case by the bill of exceptions, that although the note sued on, with a bill of exchange for $243, was taken to the Bank for the purpose of paying a bill of exchange for $1200, then in Bank, yet when it was discounted, the proceeds remained on the books of the Bank to the credit of Shaw for some time, without any specific directions from him as to how the same should be applied; and that afterwards the cashier of the Bank applied the proceeds of the note to extinguish it, which was equivalent to cancelling the discount, and having applied the mark of cancellation to it, it was delivered to the defendant.

The bill of exceptions sets out all the proof in the cause,

and from this it does not appear that this cancellation of the paper was made through any mistake. The cashier of the Bank was himself examined, and he does not say that there was any error in regard to it. In this condition, in the absence of further proof, we do not see how the Bank can recover upon the cancelled note.

The general rule is, that where payments are made by a debtor to a creditor, the debtor has the right to direct the application of the funds paid, but if he fails to give direction as to the application, then the creditor may apply the payment as he pleases. So, if the debtor has two several sureties bound with him for different debts, he may elect to which of the debts his payment shall be applied, and consequently which of the sureties he will discharge.—Burge on Sur. 122. But when either debtor or creditor legally makes the application of the payment, the other has no right to change it.

The above principles of law are of easy application to the case made by the facts set forth in the record before us. Shaw, the defendant below, having procured the discount of his note now sued on, and the proceeds having been placed to his credit generally upon the books, had the right to order or direct the specific application of the funds, either to the payment of the bill for which he was bound, or the note upon the discount of which the fund accrued. True, it would seem to be out of the ordinary course of dealing for a party to procure the discount of a note, and leave the proceeds in Bank to remain unproductive, while his note bears interest, merely to pay the note when it should fall due; but however unnatural and unwise such an operation may be, still the party had the right to make it, and if he did so, the bill remains unpaid, and the note becomes cancelled. But from aught appearing to the contrary, the discount was rescinded, and no interest was paid by him. The fact that Shaw, the maker of the note, received it back in its cancelled condition, without making any payment other than the application of the funds raised by its discount, is conclusive to show that he acquiesced in its being thus cancelled. His subsequently subpœnaing Hampton to prove that the $1200 bill was paid by the note only proves that he was attempting to set up an unreal and pretended defence, which *show* of defence, perhaps, caused the Bank to en-

ter the nonsuit. The proof clearly warranted the instruction to the jury, that although the note sued on was given by Shaw for the purpose of paying the bill, the jury must find that it was accepted by the Bank in payment, and that the subsequent conduct of the parties in applying the proceeds to the cancellation of the note, as shown in proof, was evidence that no such agreement existed. But if such agreement had been made, still before it was executed by the application of the funds in accordance with it, the parties could have altered it. Certainly Shaw, who has received the benefit of the funds in cancelling his note, cannot be allowed to avail himself of them again in satisfaction of the bill. This view shows that the note is extinguished and that the bill remains unsatisfied, so far as the proceeds of the note are concerned.

The cases to which we are cited by the counsel for the defendant in error do not militate against the view here taken. The case of Dewey v. Bowers, et al. 4 Ired. Rep. 538, merely decides that the giving up a note by the creditor to the debtor, through a mistake, is no payment or satisfaction of it.—Morehead v. The West Branch Bank, 3 Watts' Rep. 550, but affirms the general doctrine, that if a debtor give a draft to the creditor and direct the application of the proceeds to a particular debt, the creditor is bound to apply it to that liability. None of the cases come up to the case at bar, and we apprehend no case can be found where the debtor, after his acquiescence in the application of the fund in the extinguishment of one debt, and holding the cancelled demand in his hands, has been permitted to turn round and avail himself of the fund so applied the second time, in the extinguishment of another demand, to pay which he may originally have designed it. The note sued on has been cancelled. Both parties have acquiesced and adopted the application of the fund to its extinguishment, and the bill remains as it was.

The ruling of the Circuit Court was opposed to this view, and the judgment must be reversed, and the cause remanded.

Doe ex dem. McPHERSON *vs.* WALTERS.

1. If one, seized in fee of land, induces another to purchase it at execution sale, as the property of a third person, he is not estopped in a court of law from asserting his title against the purchaser. In such case a court of equity alone is competent to afford relief.

Error to the Circuit Court of Talladega. Tried before the Hon. Nathan Cook.

This was an action of ejectment by the plaintiff against the defendant in error to recover possession of the premises described in the declaration. The facts appear fully in the opinion of the court.

Rice & Morgan, for plaintiff in error.

White & Parsons, for defendant.

When a man encourages another to settle upon and improve land and expend his labor and money upon it, he will not afterwards be permitted to take it from him, although he has an older and better title to it.—McElroy v. Truby, 4 Watts & S. 323; McCormick v. McMurtrie, 4 Watts, 195; Epley v. Witherord, 7 ib. 163; Carr v. Wallace, 7 ib. 394. In this last case it is said, "There is no principle of equity and public policy better settled than this, if one knowingly though passively suffers another to purchase and spend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person."—Hatch v. Kimball, 16 Maine Rep. 106; Marshall v. Pierce, 12 N. H. 136-7; Moore v. Child & Carlton, 6 ib. 521; Reid v. Heasly, 2 B. Munr. 254. So a man may be estopped by matter *in pais, which is not in writing.*—4 Comyn's Dig., Estoppel, 200 (a 3.) So a man may be estopped by acceptance of rent.—Co. L. 352, a. (l.); ib. 352, a. (m.)

An estoppel, affecting the right of a party in real estate, may be affected by matter *in pais.*—Brown v. Wheeler, 17 Conn. 345; Shelton v. Alcox, 11 ib. 240; Martin et al. v. Ives, 17 S. & R. 364; Runlett v. Otis, 2 N. H. 167; Morris v. Rosser, 3

East. 15; Jackson v. Desling, 2 Caines, 198; 15 Johns. 497; Jackson v. Gager, 5 Cowen, 383; Robertson v. McMill, 12 Wend. 578; Jonus v. Boston Mill Cor., 6 Pick. 148; Emans v. Turnbull, 2 Johns. 313; 1 Phillips' Ev. C. & H. notes, 200, *et seq.*

DARGAN, C. J.—The plaintiff in error, being seized in fee, sold the land in controversy to one Bird, and gave bond to make titles on the payment of the purchase money, which was secured by the notes of the purchaser. One of these notes the plaintiff transfered by endorsement to the defendant Walters, who obtained judgment on it against the purchaser, who was in possession, and under the instructions of the plaintiff, had the execution levied on the land, and at his request purchased it for about one hundred dollars—the land being worth about six hundred. Afterwards the plaintiff paid the residue of the notes which he had endorsed, and filed a bill in equity against the purchaser, and had the land sold in payment of the purchase money, but the defendant was not a party to this bill. The plaintiff became the purchaser at the sale under the decree, and brings this suit to recover possession against the purchaser at sheriff's sale. Under this evidence, the court instructed the jury that the plaintiff was estopped from asserting his title against the defendant.

The plaintiff was seized in fee of the premises, and he has executed no deed by which he has transfered the title to another. This is admitted, but it is contended that the conduct of the plaintiff in directing the levy to be made on the land, as the property of Bird, the purchaser, who held his bond for title, and requesting the defendant to buy, estops him from asserting his legal title, more especially as the amount bid at the sheriff's sale by the defendant extinguished to that extent the liability of the plaintiff as the endorser of the note of Bird to him. If any one having the title to land induce another to purchase it from one who has no title, it is very certain that the legal owner cannot be permitted afterwards to assert his title and defeat the purchaser.—Sugden on Vendors, 262. But the question is, in what forum shall the purchaser defend himself? Can he defend at law, or must he resort to equity for protection?

If the defendant had been the purchaser from the plaintiff, had he paid the full price of the land under a promise that the plaintiff would forthwith make him titles—if this promise had been made with a fraudulent intent on the part of the plaintiff to obtain the purchase money and then to assert his legal title, yet the defendant could not defend himself at law against the legal title, and would be compelled to resort to a court of equity for protection. If a court of law could not protect the defendant in the case supposed, I do not see how it could, if the plaintiff, having the legal title, fraudulently induced the defendant to purchase at sheriff's sale, under an execution against one who had no title that could be sold. The title to land can pass only by deed, and an estoppel at law, which works a divestiture of title, can be created, in my opinion, only by as high evidence. I have looked with some care into the English cases, but I have not found one in which a plaintiff at law was held to be bound by a parol estoppel, when the subject matter was such that the title could pass only by deed.—If the title could pass by delivery or by parol, then a party shall be bound by a parol estoppel, and cannot be permitted, after he has induced a party to act upon a supposed state of facts, to show that these facts are untrue, to the prejudice of him who has acted on his representations.—Pickard v. Sears, 6 Adol. & Ellis, 459; Hearne v. Rogers, 9 B. & C. 577; Graves v. Key, 3 B. & Ald. 318. 23 Eng. Com. L. Rep. 79. In the case of Rowe v. Johnson, 19 Maine Rep. 141, it is said, "that no verbal agreement respecting land can create an estoppel at law, for the title to land can pass only by deed, and no man can be barred of his right to land by way of estoppel, unless by record or deed." In North Carolina, the title to slaves can only pass by instrument in writing; and in the case of Knight v. Wall, 2 Dev. & Battle, it was decided that title to slaves could not be made out at law by a parol estoppel, and if fraud had been practiced on the party, he must seek redress in equity, but that such fraud could not at law convey to him the legal title. The cases of Bolling v. Mayor &c. of Petersburg, 3 Rand. 563,—Heard v. Hall, 16 Pick. 460,—12 N. H. 127,—Hamlin v. Hamlin, 1 App. 141,—seem also to recognise the doctrine that the owner, at law, is not estopped from asserting his legal title to the land, by a fraud committed by him on the

defendant, and who, in consequence of the fraudulent acts of the plaintiff, has been induced to buy from one who had no title. I admit that cases may be found in the reports of some of the States of the Union, that seem to countenance a contrary doctrine. But when we reflect that a court of law can look only to the legal title, and that the legal title to land cannot pass by parol in this State, it is difficult to perceive how a plaintiff at law shall be estopped from asserting his title merely because of his fraudulent acts or conduct, which render it inequitable or unjust for him to assert it. If a court of law, because of such conduct or acts, should stop short and refuse to give effect to the legal title, would it not be on account of the equities of the defendant? Yet we know that a court of law will not look to *or consider* the equity of a party in opposition to the legal title of the other. The better course, in my opinion, is to pursue the well-settled rule of law, and to permit the legal title to prevail at law, regardless of the equity the opposite party may have, and leave him to enforce his equitable rights in a court of chancery, which has power not only to arrest or enjoin the suit at law, but also to decree a conveyance of the legal title to him who in equity is entitled to it.

The case of The City of Cincinnati v. White, I do not think is applicable. White had dedicated the land he sought to recover to the public use, and although this was done by parol, yet he could not be permitted to reclaim the land and deprive the public of the right confered on them by his act of dedication. This is owing to the character of the grantee, *the public*, who were intended to be benefitted by the act; but certainly a mere parol donation of land from one individual to another, let the consideration be what it will, can never divest the title of the donor, nor estop him at law from asserting it.

The remedy of the defendant is in equity: there the fraud, *if one has been committed*, can be made to act directly on the title, and the court can decree a conveyance of it, and thus unite the legal with the equitable title.

Let the judgment be reversed, and the cause remanded.

Chilton, J., not sitting.

O'CONNER *vs.* YOUNGBLOOD.

1. A sale under execution is not void, merely because the officer sells a less interest in the property than the defendant really owns.

Error to the Circuit Court of Lowndes. Tried before the Hon. Nathan Cook.

Saffold for the plaintiff in error insisted, that the sale was void, and cited Guerant v. Anderson, 4 Rand. 208; Knight v. Leak, 2 Dev. & Bat. 133; Bunts v. Cole, 7 Blackf. 266; Nesbitt v. Dallam, 7 Gill & J. 494; Jones v. Caswell, 3 Johns. Cas. 29; Pillsbury v. Smith, 25 Maine, 427; Mellville, 15 Mass. 82; Sheppard v. Simpson, 1 Dev. 237; Hurst & Shipp v. Weathers, 15 Ala. Rep. 417.

Judge & Stone, for defendant in error.

PARSONS, J.—This was an action of detinue, brought by the plaintiff in error against the defendant to recover a slave. There was a verdict and judgment for the defendant. The plaintiff took a bill of exceptions on the trial, by which it appears that the slave was sold by a constable, under several executions issued by a justice of the peace, against the property of the plaintiff. It appears that the executions, the levy and sale were regular; that several years previously the plaintiff and his wife intermarried, at which time she was in possession of said slave; that at the time of the sale, the constable publicly stated that he sold the lifetime interest of the plaintiff's wife in the slave, and actually sold said interest; that the slave was purchased by the defendant at the sale for the sum of one hundred and one dollars; that the slave was worth from three hundred to four hundred dollars, and her yearly hire from sixty to seventy dollars; and that the plaintiff at the time of the levy and sale, which took place in Lowndes county, lived in Mobile. The Circuit Court charged the jury, in effect, that if they believed the foregoing facts, they ought to find for the defendant, and that it would not vary the case, if they should find that at the time of the sale and

before, the constable proclaimed that he only sold the lifetime interest of Mrs. O'Conner, to which charge the plaintiff excepted.

The plaintiff's counsel contends that the sale was void, because the constable sold an interest, the supposed life estate of the wife, which does not appear to have existed, except in the imagination of the constable. Upon the facts stated, the presumption of law certainly is, that the property of the slave was in the plaintiff himself, and that his wife, since the time of the marriage, has had no interest whatever in the slave. For the purpose of supporting his conclusion, the plaintiff's counsel has refered us to several decisions, and we will briefly notice those which we think are most in point.—In Pillsbury v. Smith, 25 Me. 427, the plaintiff caused his execution against the defendant to be levied upon the defendant's supposed equity of redemption in some real estate, which supposed right of redemption was accordingly sold and the plaintiff became the purhaser. It was afterwards ascertained the mortgage which Smith had executed upon the real estate, had been discharged before the levy and sale; so that, in fact, there was no equity of redemption, but Smith owned the entire estate. The plaintiff's execution was returned satisfied to the extent of the proceeds of the sale of the supposed equity of redemption in the real estate, which was in two parcels, one of which was afterwards sold under the execution of another creditor as the property of Smith. Pillsbury afterwards brought a *sci. fa.* to revive his judgment and to have execution notwithstanding the sales, upon the ground that the plaintiff had acquired no title to the supposed equity of redemption. And the court sustained the proceeding, remarking that "the debtor having an absolute title to the land itself, when the seizure upon the execution was made, the proceedings of the affair were not such as the statute required in reference to such an estate." The court treated the sale of the supposed equity of redemption, as a sale of nothing, as a nullity, and relieved the plaintiff in execution from his purchase. But it must be remarked in the first place, that it was a direct proceeding to set aside the sale, &c. and in the next, that the sale there was of a supposed estate which did not exist, and that the mode of the proceeding in reference to the supposed equity of redemption was not

such as the statute required in regard to an absolute title. Further, it is consistent with the bill of exceptions in the present case, to suppose that the purchaser and all others present were aware that the executions were against the property of the plaintiff, not of his wife, and that the constable did not therefore intend to proclaim or to sell the supposed life estate as the present property of the wife, but as the property of the husband in right of his wife. In this way we think he must have been understood. There is no evidence of fraud in the purchaser. It was probably believed by him and others that the husband, in truth, had only an estate for the lifetime of his wife in the slave—hence the low price at which the slave was sold. The most that can be said is, that in the present case, the officer took it upon himself to sell a limited interest when in realty the defendant in execution had the absolute estate in the slave. It appears that, although the defendant in execution had the absolute property in the slave, yet the purchaser only acquired the interest that was actually sold.—Guerrant v. Anderson, 4 Rand. Rep. 208; Knight v. Leak, 2 Dev. & Bat. Law, 133. We therefore think the sale was not void as against an innocent purchaser. Such a sale might probably be set aside in a direct proceeding for that purpose, but if so, it would be done upon equitable terms. If there could be no summary proceeding for this purpose before the justice of the peace, it could be done perhaps in equity.

Let the judgment be affirmed.

PHILLIPS *vs.* BEENE.

1. An opinion expressed by the court, during the progress of a trial, which does not appear to have been given in charge to the jury, or to have been in any way connected with a refusal to charge, or with the admission or rejection of testimony, cannot be the subject of revision in this court.
2. Where the declaration in an action of slander alleges, that the words spoken were in reference to an oath taken by the plaintiff before the register and receiver of a land office, touching the entry of land,

proof of an oath taken before a notary public, concerning the same subject matter, does not support the allegation.

3. A party is entitled to have a correct charge given in the words in which it is asked, and the giving of another charge, after its refusal, the same in substance, will not cure the error.
4. Parol proof of an entry under a pre-emption right is inadmissible, without first showing that the record evidence thereof cannot be had.

Error to the Circuit Court of DeKalb. Tried before the Hon. Lincoln Clark.

This was an action of slander by the defendant against the plaintiff in error. The declaration avers that in a matter of controversy wherein Jacob Beene was establishing a pre-emption right, &c., before the register and receiver of the land office at Lebanon, the plaintiff was sworn as a witness before said register and receiver, and gave testimony, and that the defendant spoke and published of and concerning said plaintiff and his said oath and testimony the false, malicious and defamatory words, &c. The bill of exceptions recites that "the above entitled cause came on for trial, when the question was raised before the court as to the competency of the register and receiver of the land office at Lebanon to administer an oath to witnesses and applicants for the benefit of the pre-emption law of 22d June 1838, when the court determined that in law the register and receiver was competent to administer such oaths, to which defendant excepts." The proof adduced in support of the declaration was the copy of an affidavit, certified by the commissioner of the General Land Office, which affidavit was made and sworn to by the plaintiff before a notary public, and had reference to a pre-emption claim preferred by Jacob Beene to the register and receiver at Lebanon. The plaintiff also proved by a witness, that a pre-emption had been obtained in the land office at Lebanon, to which testimony the defendant objected, but the court overruled the objection. It was in evidence that it was customary for the register and receiver, or either of them, to swear witnesses, examine them, and turn them over to the notary to reduce their testimony to writing.

The defendant asked the court to charge the jury, that if from the testimony they believed the oath was taken before a notary public, and so appeared upon the face of his certificate,

it was not sufficient proof to sustain the plaintiff's allegation that it was taken before the register and receiver, which charge the court declined giving, but charged the jury that if from the testimony they believed the oath of said witness was taken before the register or receiver, both being present, and that he was by them examined, and then turned over to the notary public to reduce the testimony to writing, it was sufficient.

The rulings of the court, the refusal to charge as requested and the charge given are now assigned as error.

WHITE, for the plaintiff in error.

J. B. MARTIN, for the defendant:

1. There is no law or statute, forbidding a notary public from administering the oath in cases of this character; and it is proved that such has ever been the custom in the land office in which this proceeding was had.—8 Wheaton, 326; Hill v. Norris, 2 Ala. Rep. 640.

2. The custom or usage here established is not opposed to any established principle of law, nor unreasonable in itself.—On the contrary, it is equally important for convenience and dispatch of business, that the register and receiver should swear witnesses, through some person appointed for that purpose, as that the judge of the Circuit or County Court should swear their witnesses through clerks, for which in most cases there is no express authority.—Gibson v. Culver, 17 Wend. 306; Desha, Smith & Co. v. Holland, 12 Ala. 516; 2 Cowan & Hill's Notes, 1413-14; Brown v. Farran, 3 Ohio, 154.

The charge of the court is sustained by the case of Hall v. Montgomery, 8 Ala. Rep. 510.

CHILTON, J.—We cannot review the point first attempted to be presented by the bill of exceptions. That informs us that when the cause was being tried a question was raised before the court as to the competency of the register and receiver of the land office to administer an oath to witnesses and applicants for the benefit of the pre-emption law of 22d June 1838, when the court determined that in law the register and receiver was competent to administer such oaths. How the question was raised does not appear. It may have

been insisted on by the counsel as an abstract proposition of law, and the court may have differed with him, but it cannot be seriously contended that every expression of opinion by the court during the progress of the trial, if erroneous, shall furnish ground for reversal. Such opinion must in some way influence the result of the cause, or be supposed to do so by being given in charge to the jury, or by a refusal to charge, or by being connected with the exclusion or admission of the evidence. A judge may decide right from a wrong reason, and if his decision be right, the revising court will not reverse, whatever erroneous propositions of law he may assume as the predicate for his conclusion. As then, in this case, it does not appear that the opinion expressed by the judge was given in charge to the jury, or even expressed in their hearing, and as the bill of exceptions does not show that it was in any way connected with the admission or rejection of testimony, we cannot notice the point further than to consider it as the response of the court to the suggestion of the counsel, in no way connecting itself with the judgment in the cause.

The declaration charges that the slanderous words were spoken by the defendant, of and concerning the plaintiff, and concerning a certain oath taken by said plaintiff before the register and receiver of the land office at Lebanon, in the matter of a controversy pending before them in relation to a preemption entry, in which said plaintiff was examined as a witness, &c. The defendant asked the court to charge the jury, that if from the testimony they believed the oath was taken before a notary public, and so appeared upon the face of his certificate, it was not sufficient proof to sustain the plaintiff's allegation that it was taken before the register and receiver. The affidavit of the party appears to have been made before a notary, and by him certified as sworn to and subscribed before him, which affidavit was forwarded to the General Land Office, and a certified copy used in the court below. This charge was clearly not abstract, and it presented the question of variance between the declaration and the proof. We think it exceedingly clear that if a suit is brought for slanderous words uttered respecting a party's testimony in one court, it will not suffice to sustain the declaration, if the words are not actionable in themselves without the colloquium, to prove that

they were spoken in reference to a different oath, or an oath administered by a different court. The charge of false swearing before the register and receiver would not be the same as charging the party with swearing falsely before a notary public, although the affidavit might be made in respect of the same subject matter; and a recovery for the one would constitute, I apprehend, no available bar to a suit for the other.—7 Bac. Abr. (Bouv. ed.) 497 to 508; Pharr & Beck v. Batchelor, 3 Ala. Rep. 237. The court, we conclude, mistook the law in refusing this charge; nor is the error cured by giving another charge subsequently, embracing substantially the charge asked, but limiting it to the testimony as the court seemed to suppose it preponderated. This court has often decided that a party is entitled to have a correct charge given as asked, and the giving of another charge, the same in substance, after the refusal of the first, will not cure the error.—4 Ala. Rep. 116; 11 ib. 535; ib. 1059; 13 ib. 222–537.

We are not called upon to express any opinion as to the authority of a notary public to administer the oath, in the taking of which the party was charged to have sworn falsely.—We know that affidavits of the kind, sworn to before notaries public, have for many years past, at some of the land offices of this State, been received and acted on by the registers and receivers, as well as the Department at Washington; and it would seem somewhat strange that there should be no authority found in the law, or the regulations of the General Land Office Department made in conformity with the law, to receive such proof. As, however, the case does not involve the point, we decline its investigation. See, however, Hall v. Montgomery, 8 Ala. Rep. 510.

The admission of parol proof to show that Beene obtained a pre-emption right was clearly erroneous. The officers of the land office keep their records of entries made, and the receiver gives to the party making such entry a duplicate receipt for the payment, specifying the land entered, the date, the area of the land, and the amount paid. As there is better evidence of the entry, it cannot be proved by parol, without first showing that the better testimony cannot be had. This point was expressly decided by this court in Yarbrough v. Hood, 13 Alabama Rep. 176. See also Mitchell v. Cobb,

ib. 137, where it was held that parol evidence is inadmissible to show that land was or was not an Indian reservation.

Let the judgment be reversed, and the cause remanded.

NOLEN & THOMPSON *vs.* THE HEIRS OF GWYN.

1. Where there is no subscribing witness to a lost deed, a sufficient predicate being laid to let in secondary evidence, its contents may be proved by any one who has read it and knows what it contains.
2. Where a subsequent purchaser insists that, as against a prior grantee, whose deed has not been recorded, he is a *bona fide* purchaser without notice, it is incumbent on him to prove the payment of a valuable consideration: The recitals in his deed are not evidence thereof.
3. Upon the approval by the President of a contract, made by an Indian reservee under the Creek Treaty of 1832, for the sale of his land, the title of the purchaser relates back to the date of the contract, and inures to his intermediate vendee, whether by quitclaim or warranty deed.

Error to the Circuit Court of Macon. Tried before the Hon. Geo. W. Stone.

This was an action of trespass to try titles, brought by the plaintiffs against Isham Gwyn in his life time, and after his death, revived against his heirs at law. The bill of exceptions contains a copy of the patent for the land in controversey to William H. Simmons and George W. Thompson, dated the 12th January 1841, which recites that they purchased the land in 1834, from an Indian reservee under the Creek treaty of 1832, and that the contract of purchase was approved by the President on the 11th January 1841. The plaintiffs rested their title before the jury upon the patent and a deed from said Simmons to Nolen, dated the 21st May 1842. The defendants introduced as a witness one Hope, who testified that in 1839, he saw in the possession of one Connell, a deed, which he read enough of to know that it was a deed, but he was not asked, nor did he state whether there was or was not a subscribing witness to it. The witness was asked by the

counsel of the plaintiffs if he knew who wrote the deed, and answering in the negative, he was farther asked if he had not said that it was in the hand writing of one Barclay, to which he replied that he may have said so, as he was once under that impression. Barclay was subsequently introduced by the plaintiffs solely to impeach the credit of Hope, and testified that Hope did say to him that he Barclay wrote the deed and that one Jolly was a subscribing witness to it. The bill of exceptions recites that the defendants having laid a sufficient predicate to let in secondary evidence, offered to prove the contents of this deed by said Hope, to which the plaintiffs objected on the ground that Jolly was not produced, which objection the court overruled, and the witness stated that the deed was dated in 1839, and was from Simmons to Connell for the land in controversey. The defendants then offered in evidence and read to the jury a judgment against Connell, founded on a forfeited injunction bond, an execution issued thereon, and the sheriff's deed for the land, by virtue of a sale under said judgment and execution, to said Gwyn—all bearing date in 1842, after the purchase of the said Nolen, and proved the possession in Connell to within a short time before the date of the deed from Simmons to Nolen, at which time Simmons was in possession. Upon this evidence the plaintiffs asked a charge of the court, which was refused and which will be found copied in the opinion of the court. To the ruling of the court and its refusal to charge as requested, the plaintiffs excepted and now assign them as error.

S. Williams, McLester and Cocke, for pl'ffs.

Rice, Belser & Harris, for defendants.

DARGAN, C. J.—It is not necessary to determine whether an injunction bond, after the dissolution of the injunction, creates a lien on the lands of the obligors or not, for it is clear that after a levy and sale by an execution issued on the bond in the manner prescribed by the act, the title passes to the purchaser. It follows, therefore, that Gwyn by his purchase acquired such title as Connell had; he stands in the stead and shoes of Connell, and if the plaintiffs are entitled to recover as against Connell, they are equally entitled to recover against

Gwyn. This view renders it unnecessary to examine some of the questions argued at the bar, and leaves but three upon which we think it is necessary to express an opinion. 1st. Did the court err in permitting parol proof of the contents of the deed from Simmons to Connell? The proof does not show that there was a subscribing witness to the deed. It is true, that Barclay testified that Hope, by whom the contents of the deed from Simmons to Connell were proved, stated to him that one Jolly was a witness to the deed, but it must be borne in mind that Barclay was introduced for the sole purpose of impeaching the credibility of Hope, and had never seen the deed, nor did he know whether there was a subscribing witness to it or not. The testimony of Barclay, though legal for the purpose for which it was introduced, did not prove or even tend to prove, that the deed was attested by a subscribing witness. The bill of exceptions affirms that a sufficient predicate was laid to let in secondary evidence of the contents of the deed, and there was no proof that there was a subscribing witness to it. Any person, therefore, who had seen and read the deed and who knew its contents, was competent to testify as to what it conveyed.

2. The testimony tended to show that Simmons one of the patentees was in possession of the land at the time he conveyed to Nolen, and there was no evidence that Nolen had notice of the deed from Simmons to Connell, nor has the deed to Connell ever been recorded. The plaintiffs requested the court to charge the jury, that if they believed that Simmons executed a deed for the land in the year 1839, to Connell, who took possession and occupied it five or six years, and then left the possession, that afterwards, Simmons, the grantor, went into possession, and whilst so in possession, exercising acts of ownership over it, he sold it to Nolen, then Nolen was an innocent purchaser without notice, and must be protected; this charge was refused, and the plaintiffs excepted. As the deed to Connell has never been recorded, of course it must be void as against a subsequent *bona fide* purchaser, this is expressly declared by our statute. The whole question then is, whether Nolen is a *bona fide* purchaser—if he is, he is entitled to recover, not only as against Connell, the first vendee from Simmons, but also against any one else who claims

through Connell; for if the deed to Connell be void because it has not been recorded, no one can have a title, who claims through it as against a *bona fide* purchaser. When one insists that he is a *bona fide* purchaser without notice, it is incumbent on him to prove two facts: 1st—a conveyance of the land to him, and secondly, that he has paid a valuable consideration for it. If he fails to establish either of these, he has failed to show that he is a *bona fide* purchaser.—Jewell v. Palmer & May, 7 Johns. Ch. Rep. 65, and cases there cited. This is the invariable rule in equity, and it cannot be contended that a different rule prevails at law. There was no proof whatever that Nolen had paid the purchase money specified in the deed to him, except the recitals in the deed. Are such recitals evidence against Connell, or those who claim under him? The rule we think is without exception, that the declarations or admissions of a vendor or assignor, made after the sale or assignment, are not evidence to defeat his vendee or assignee. A contrary rule would enable a vendor or assignor, after he had parted with all his interest, to defeat the title of his own purchaser. Now, the recitals in the deed from Simmons to Nolen, acknowledging the payment of the purchase money from Nolen, can be considered in no other light. Simmons had parted with all his interest in the land by his deed to Connell, and he therefore could make no admissions that would be binding on Connell or those who claim under him. In the case of Doe on the demise of McGintry et al. v. Reese, 10 Ala. 137, the precise question here presented was raised. The plaintiff in that case claimed through a mortgage—the defendant through a sheriff's deed. The judgment under which he derived title was junior to the mortgage, but the debt on which the judgment was rendered was older. There was no evidence of the consideration of the mortgage, except the recitals in the mortgage deed. This court held that they were not evidence of a consideration, but must be considered as the declarations or admissions of a stranger. If the admissions of the mortgagor contained in his deed cannot be received as evidence to defeat a creditor, whose debt was not in judgment, when they were made, and who in fact was the owner of the land when the mortgage was executed, surely the ad-

mission of the vendor, after he has parted with all interest in the land, cannot be received to defeat his own deed.

3. But it is contended that the charge should have been given for the reason that the patent to Simmons and Thompson bears date in 1841, and the deed from Simmons to Connell in 1839; and as there was no evidence to show that this deed contained a covenant of warranty, the legal presumption was, that it was a mere quitclaim deed, and if so, the title derived by the patent did not pass to Connell, as Simmons had none at the time it was executed. It is but reasonable to suppose that this question was not presented to the court below, for the charge asked is not the most appropriate that could have been requested to elicit the opinion of the court on the question. We, however, will consider the question as if raised by a direct and appropriate request. The recitals in the patent show, that Simmons and Thompson are purchasers from an Indian reservee, under the treaty of 1832 with the Creek Indians; their contract of purchase was made with the Indian in the year 1834, but was not ratified and approved by the President until 1841. If we admit that Thompson and Simmons had no title until their contract was approved of by the President, and that until then it was void, still we are clearly of the opinion, that as soon as it was approved of by the President, it had relation back to the date of the contract with the Indian reservee. At the time of their contract, if they had no title, yet they had a contract capable of confirmation, and when confirmed, their title would relate back to the time of their purchase from the Indian. If this be correct, then the deed to Connell, whether with warranty, or whether it was a mere quitclaim, would pass such title to him as was conveyed to Simmons by the patent. After a deliberate examination of the question, I am satisfied, contrary to my first impression, that there is no error in the record, and the judgment must be affirmed.

Chilton, J., not sitting, having been of counsel before his election to the Bench.

BRAZIER & CO. *vs.* KING.

1. On final settlement of the accounts of an executor or administrator, the Orphans' Court does not possess the power to render a decree in his favor, or to go further than to discharge him. Where the court, therefore, certifies a balance in his favor, it is *coram non judice*, and cannot be received as evidence against the administrator *de bonis non*.

Error to the County Court of Lowndes. Tried before the Hon. E. H. Cook, Judge.

The plaintiff in error sued out a summons of garnishment against the defendant in error as the debtor of one Boling Smith. The defendant answered, denying any individual indebtedness, and submitted a statement of facts for the judgment of the court. From this statement it appears, that Smith was the executor of his deceased father, Jeremiah Smith, and a distributee of his estate, of which the defendant is now the administrator *de bonis non*, and which is still unsettled, and that in a settlement of the administration of said Smith in the Orphans' Court of Autauga, in 1844, the court certified a balance in his favor against the estate of $2351 99. No proceedings have been instituted to set aside this settlement, but the garnishee denies its correctness, and insists that upon a fair settlement said Smith would be found largely indebted to the estate. The garnishee states that he is in possession of a considerable amount of property belonging to the estate, and that he has been informed that John Steele claims the distributive interest of said Smith. Upon this answer an issue was formed and submitted to a jury, who were instructed by the court that if they believed the evidence, no such indebtedness from the garnishee to Boling Smith was shown as was the subject of garnishment at the suit of Smith's creditors. The plaintiffs excepted to this charge, and now assign it as error.

Boling, for plaintiffs in error:

This case is unlike the one of Mock v. King, garnishee, 15 Ala. Rep. 66. That was a proceeding to subject to the process of garnishment the undivided interest of one of several

distributees of an estate, in the hands of an administrator *de bonis non.*

In the case at bar, Boling Smith, the executor of Jeremiah Smith, deceased, on final settlement, had a large balance decreed in his favor, which proceeding has been sanctioned by this court. See King & Ansley, adm'rs, v. Smith & Steele, 15 Ala. Rep. 264.

O. P. King, who became administrator *de bonis non* of the estate of Jeremiah Smith, and who succeeded Boling Smith, the executor, received all the assets of the estate, and had in his hands the amount of the decree in favor of Boling Smith, over and above the assets of the estate; this amount belonged to B. Smith individually, and not as distributee, and he could sue and recover the amount of the decree. See Sellers, guardian, v. Smith, 11 Ala. Rep. 264; Wilson v. Sergeant, 12 Ala. Rep. 778.

B. Smith having the right to recover the amount decreed him by the Orphans' Court, by an action of debt or assumpsit, it is subject to garnishee process by his creditors. See Walke v. McGehee, 11 Ala. Rep. 273.

WATTS & JACKSON, for defendant:

1. Garnishment is a *legal* process—no equitable interest or chose in action can be condemned under it. Hopper v. Thomas, adm'r, 5 Ala. 442; Jones v. Norris, 2 ib. 526; Spaight v. Johnson, 14 ib.; Mock v. King, 15 ib. 66, and authorities there cited.

2. No administrator can by any contract charge the estate, *at law*, of which he is administrator. McEldery & Chapman v. McKenzie, 2 Port. 33.

3. The Orphans' Court had no power to make any such certificate of balance. The Orphans' Court has no power to render judgment in favor of any person except creditors and distributees, and no power to render judgment against any person except the administrator making the settlement. See Jones & Conner v. Jemison & Stewart, 4 Ala. 632. *A fortiori* it could not certify a balance in favor of the administrator making the settlement, so as to be binding on subsequent administrators.

4. No action of assumpsit or debt would lie against the ad-

ministrator *de bonis non* upon the certificate of balance made by the Orphans' Court of Autauga.

The facts in this case correspond to those in Mock v. King, 15 Ala. 66, and that case is directly in point and decisive of the present.

CHILTON, J.—Waiving the consideration of the question whether the plaintiff in error was in any event entitled to a judgment upon his garnishment without having first afforded John Steele, to whom the garnishee answers he was informed the interest of Boling Smith had been transfered, an opportunity of contesting, we will proceed to the investigation of the charge of the court which was excepted to, and which was, that if the jury believed the evidence, no such indebtedness from the garnishee to Boling Smith was shown as was the subject of garnishment at the suit of Smith's creditors.

In Mock v. King, 15 Ala. Rep. 66, we held that the undivided interest of one of several distributees of an estate, in the hands of an administrator *de bonis non*, &c. is not subject to the process of garnishment. That decision is conclusive upon the plaintiff in error, so far as respects the distributive share of Boling Smith in the estate of Jeremiah Smith, deceased, in the hands of the present garnishee. The only remaining question is, whether the facts set forth in the record authorised a judgment against the garnishee for the alleged balance due to Boling Smith, certified in the decree of final settlement made by the Orphans' Court with Smith as executor of the estate of said Jeremiah Smith. Upon the settlement alluded to, the entry of the Orphans' Court recites that the account of the executor, having been examined by the court, was allowed, and ordered to be filed and recorded. The entry proceeds—"And it appears to the court from the account stated and allowed, that the said estate is indebted and in arrears to the said Boling Smith in the sum of twenty-three hundred and fifty-one 99-100 dollars." The garnishee denies the existence of this balance in favor of Boling Smith, and insists that upon a fair settlement of his accounts as executor of the estate, he will be found largely indebted. What is the effect of the decree of the Orphans' Court? It is insisted by the counsel for the plaintiff, that it ascertains the amount due from the estate to B. Smith

in his individual right, and which sum is chargeable upon the assets in the hands of King, the administrator *de bonis non*, and that inasmuch as the removed executor would be entitled to sue for and recover from the administrator *de bonis non* the sum thus found due him, the process of garnishment, which is the mere exercise of that right in a summary mode on the part of the creditor of Smith in his stead, will lie to recover the fund.

Without stopping to determine whether or not such action would lie, in case there really existed an indebtedness, as certified by the Orphans' Court, it is sufficient for the present purpose to remark that the Orphans' Court, although by the statute invested with jurisdiction to settle the accounts of the removed administrator or executor, and to render a decree in behalf of the administrator *de bonis non* under a recent statute, does not possess the power to give any judgment in favor of the removed executor against the administrator *de bonis non*. The sentence of that court, going beyond the discharge of the executor, was clearly *coram non judice*, and does not conclude the parties from showing that such balance does not exist.

In Jones & Conner v. Jemison & Stewart, 4 Ala. Rep. 632, it was held that the Orphans' Court, on the final settlement of an estate, had no jurisdiction to render judgment against any person but the representative of the estate to be settled. In the case before us, no judgment against the administrator *de bonis non* was entered. The balance was ascertained as incidental to the settlement of the account. The court could go no farther than to discharge the executor, and this was the effect of the settlement. (King & Ansley, adm'rs, v. Smith & Steele, 15 Ala. Rep. 264.) All beyond this was matter wholly without the jurisdiction of the court, and could not be received as evidence to charge the administrator. It follows from this view, as the settlement constituted the only evidence of the indebtedness of the estate to Boling Smith aside from his interest as a distributee, the charge of the court, which in effect denies its sufficiency to authorise a judgment against the garnishee, was correct.

Let the judgment be affirmed.

STEWART, GUARDIAN, *vs.* LEWIS, BY HIS GUARDIAN, &c.

1. A mother, in poor circumstances, is not bound to support her infant child, when it can be supported out of its own estate, and where she has done so, a just allowance should be made to her for its past maintenance.
2. If the guardian of an infant, without an order from the Chancellor, or Judge of the Orphans' Court, appropriate the principal of his ward's funds to any purpose whatever, he does so at his peril, but if the appropriation was such as the Chancellor or Judge would, on application, have authorised and directed, he should be allowed it on the settlement of his accounts.

Error to the Orphans' Court of Montgomery. Tried before the Hon. Adam C. Felder.

THE facts of this case will be found sufficiently set out in the opinion of the court.

WATTS & JACKSON, for plaintiff in error:

1. Under the facts set forth in the record, the mother is entitled to compensation for the support of her son.—See Whipple v. Dow, 2 Mass. 415; Dawes v. Howard, 4 ib. 97.

2. The assertion in the record, that the mother was able to support her son, is a gratuitous opinion. Whether the mother was able to support her son or not, is a matter of deduction or inference, and the inference must be based upon facts; and it cannot be infered from the fact stated in the record, that the widow "owned an old negro woman forty years old and a negro boy twelve years old, and one hundred and fifty acres of land," that she was therefore able to board her son without compensation. This is bad reasoning, and not law.

3. The son received by his guardian a separate property from his father's estate, to wit, $305 and two negroes, and this property should be applied to his maintenance and education.

4. The allowance of the $94 for physicians' bills and other expenses, has nothing to do with the merits of the question, but the court having adopted the rule of allowing charges for expenses, why did it not act upon that rule throughout and

allow the charge for board? If the physician's bills were an item of expense the board can certainly be nothing less.

5. Allowing that the separate estate of the son will be consumed in his support by the time he is brought up, it is better that he should have no property when he becomes of age, than that the means of the mother be exhausted in his support, and she be left destitute in her old age.

6. At the common law, the mother is not entitled to the services of the child, and therefore she is not bound to support the child.—Roberts v. Connely, 14 Ala. Rep. 235; see particularly the reasoning of the court in this case on page 241.

No counsel for the defendant.

PARSONS, J.—This cause came up from the final settlement of Stewart, as late guardian of William H. Lewis, then, and still an infant. The only error assigned is, that the court below refused to allow to Stewart on the settlement certain sums, which he had paid for the board of the ward. It appears by the bill of exceptions, taken by Stewart, on the final settlement, that "the court refused to allow a charge in said account for board paid by said guardian to Winney Lewis, the mother of said William H. Lewis, amounting to forty-five dollars and fifty cents, for the year 1844; the same amount for 1845 for board, and also the sum of two hundred and sixteen dollars for board for the years 1846, 1847 and 1848." It appears by the bill of exceptions, that Stewart became the guardian on the 24th December 1845, and that the ward has resided with his mother ever since his father's death; that the ward was still of tender years, having been born in Feb. 1843, being his mother's only child. It appears that the Orphans' Court refused to allow for the money paid for the board, or any part thereof. It further appears by the bill of exceptions that the mother and child both had small estates, nearly equal in value, and it is to be infered these payments were made out of the principal of the funds in the guardian's hands.

The question arises whether the mother is compelled to maintain her infant child while it has some estate of its own, she being in limited circumstances. In a similar case in Massachusetts, it was held, that the mother was not bound to support her infant children, who could support themselves,

and in this opinion we concur, especially if she is in low circumstances.—Whipple v. Dow and Wife, 2 Mass. Rep. 415. And the same doctrine was re-asserted in Dawes v. Howard, et al. 4 Mass. Rep. 97, in which the court cites a passage from Comyn's Digest, Chancery 3, O. 1, 2, 3, R. 6, that "the court may make a liberal allowance out of the infant's estate to the mother, or a guardian who is in distressed circumstances."

The bill of exceptions in the present case would have been more satisfactory, if it had shown that the mother had indicated an intention to charge for the board of her child as far back as her accounts extended. On the other hand, however, she had the rightful custody of it—there was no guardian then to whom she could make her intention known. It does not appear either, at what particular time or times her accounts for the board were paid, or that she ever expressed her intention to charge, before the time of payment. Presuming against the bill of exceptions, in consequence of these omissions, we conclude that the guardian paid for the board at, or shortly before the time when the proceedings for final settlement were commenced, and that the infant's mother never declared her intention to claim compensation for its hoard until about that time. This is putting the question in its strongest light against the claim of the guardian to be allowed for these payments. Still, if she were entitled either in law or equity to recover for board, these payments ought to have been allowed.

In general, a father is not entitled in any form to compensation for the support of his infant children. But this rule has its exceptions. In Reeves v. Brymer, 6 Vesey, 425, a father was allowed for expenditures made in support of his infant daughter, before the master's report. It had been the practice not to allow for support in such cases, previous to an application for the purpose, and a report from the master, and then and still only in proper cases. But in the case cited, the Lord Chancellor expressed his approbation of the practice as altered by Lord Rosslyn, and made the order for the allowance. And in a subsequent case, the Lord Chancellor made an order, allowing to a father for the time past, as well as for the time to come.—Sherwood v. Smith, 6 Ves. 454. There are other cases still to the same effect.

But at a subsequent period, the Master of Rolls, according to what he understood to be the then present practice, limited the practice as stated in Vesey, cited above, but said that the court might, in a special case, direct an inquiry as to the propriety of an allowance to the father for past maintenance of the infant.—*Exparte*, Bond, 2 Mylne & Keene, 439. We do not doubt the propriety of thus limiting the practice as to a father's claim for past maintenance of his child, but it is altogether a different question as to a mother's claim, who is not bound to support it if it can be supported out of its own estate, certainly not if she is poor, as in this case. This is one of those special cases, in which it is very clear that an allowance might be made for past maintenance. It is upon the mere equity of the case that such an allowance is made. It is therefore immaterial whether the mother exhibited her claim at the time it commenced or not.

When a mother and her children take the estate of the husband and father under the statute, and the infants remain with her and are supported by her, we think she is, in general, entitled to an account for their support.—Wilkes and Wife v. Rogers, 6 Johns. 565. It is, therefore, our opinion that the mother had a right to be compensated for the board of her infant child, which, it appears, the guardian paid. Whether he paid too much or not, is a different question, that can be decided by the Orphans' Court.

There is still a question, however, whether the guardian could appropriate, without leave of the court, any portion of the capital or principal of the infant's estate in its maintenance, or for its debts. In England they cannot dispose of the principal of the funds of their wards in any case, without leave of the chancellor.—4 Mass. Rep. 99; 3 Daniel's Chan. Plead. & Prac. 2088. But in this State, it is enacted, that if the personal estate, and rents and profits of the real estate, be not sufficient for the maintenance and education of the ward, the Orphans' Court, on full investigation thereof, may order the guardian to sell such parts of the ward's lands, tenements and hereditaments as they shall direct, &c.—Clay's Digest, 268, § 6. But in the present case, as we infer from the bill of exceptions, the guardian paid the mother's account for board out of the principal, not the interest of the funds of the ward

in his hands, and this without the order of the chancellor, or of the Orphans' Court. This was at his peril. But if it were a payment which, on application, the chancellor or the judge of the Orphans' Court would have ordered, the guardian should be allowed for it.

Let the decree of final settlement be reversed in respect of the payment for the board to the mother of the ward, and settled in conformity with the principles of this opinion.

WALLIS *vs.* LONG.

1. A mortgagee may release his mortgage by a sufficient parol agreement, although the mortgage be under seal and the debt unpaid.
2. Where a writ in detinue is served on the defendant twenty-four days after its issuance, the execution by him of a replevy bond for the property does not estop him from showing that it was not in his possession at the commencement of the suit.

Error to the Circuit Court of Talladega. Tried before the Hon. J. J. Woodward.

This was an action of detinue brought by the plaintiff against the defendant in error to recover a slave by the name of Harriett. The plaintiff on the trial, in support of his title, offered in evidence a deed of mortgage of said slave executed by one John Simmons to him on the 6th day of August 1844, to secure the payment of certain notes to him by said Simmons. He then proved the value of the slave and of her hire, and execution by the defendant of a replevy bond for the slave when the writ was served, which was twenty-four days after its issuance. The defendant proved by a witness, that in the latter part of the year 1845, he heard the plaintiff and said Simmons conversing about the debt and mortgage, and in that conversation, it was admitted that about the last of the year 1844, there had been an exchange of Harriett for a negro named Sam, and that by agreement, the plaintiff had accepted Sam in lieu of Harriett, and had him in possession two or three months when he went back to the possession of Simmons. It was further shown that Harriett never was in

the plaintiff's possession. The defendant also introduced evidence tending to show that at the date and issuance of the writ Harriett was not in his possession, but in the possession of his son, Robert Long. On this evidence the court charged the jury, that by an executed verbal contract a lien upon one slave might be substituted for a written lien or mortgage on another, but it must be an entire substitution in all respects, and not a temporary exchange merely, and that if they believed from the evidence, that there had been such a substitution of Sam for Harriett, the plaintiff had no right to recover. The plaintiff asked the court to charge the jury, that the execution of the replevy bond, at the time of the service of the writ, estopped the defendant from denying that he had possession of Harriett at the commencement of the suit, which charge the court refused to give. To the charge given, as well as to the refusal to charge as requested, the plaintiff excepted, and now assigns them as error.

White & Parsons, for plaintiff:

The charge of the court is abstract. There was no evidence going to show an exchange of Harriett for Sam, further than the mere right of possession for a few months. Under the mortgage after a certain time, plaintiff had a right to the possession of Harriett, and Sam was put in her place for a short time. There was no proof of any *verbal mortgage* (if any such nondescript is known to the law,) nor that plaintiff surrendered his lien upon Harriett, or satisfied his mortgage. The evidence conduced only to shew an exchange of one negro for the other, and not a change in the security which Wallis had taken for his debt.

The second charge asked for should have been given.—Philips v. Hall, 8 Wend. 610; Drown v. Smith, 3 N. H. 299; Goslin v. Beene, 7 Bing. 339; Harris v. Watson, 2 Barn. & Cress. 549; Philips Ev. C. & H. notes, vol. 2, pt. 1, p. 200, *et seq.*; Chapman v. Searle, 3 Pick. 38; Bursley v. Hamilton, 15 Pick. 40.

Rice & Morgan, for defendant:

1. A mortgage (or any other contract under seal,) will be considered as abandoned and discharged by a subsequent *ex-*

ecuted parol contract.—Barrelli, et al. v. O'Conner, 6 Ala. Rep. 617, and cases therein cited; Deshazo v. Lewis, 5 Stew. & Porter, 91.

2. Estoppels are not favored. They must be mutually binding, or they do not bind either party. Admissions, whether written or verbal, are not conclusive, unless they have induced the other party to act upon them.—Edmondson v. Montague, 14 Ala. Rep. 371.

3. Where an action of detinue was commenced on the 2d of October 1848, and the writ was executed on the 27th of that month by handing defendant a copy and taking bond for the delivery of the slave sued for, &c., the *execution* of such bond does not *estop* the defendant from denying that he had possession of the slave; but if the defendant can prove that he did not have possession of the slave sued for *at the commencement of the suit*, he will be allowed to do so, to defeat the action.

DARGAN, C. J.—A mortgage is a mere security for the payment of a debt. It forms no part of the debt itself, and therefore may be released or discharged without affecting the validity of the debt. This is not denied by the counsel for the plaintiff, but it is contended that as the mortgage deed was under seal no parol agreement should be received as evidence of its discharge. To this argument we cannot assent. In the case of Barrelli & Martin v. O'Conner, 6 Ala. Rep. 617, this court held, that evidence might be received of an executed parol contract in discharge of a contract under seal. The decision is well sustained by authority, and in our judgment recognizes the correct rule. The evidence was therefore properly admitted and it justified the charge given by the court to the jury, for it tended to show a new and distinct contract with the mortgagor, by which the girl Harriett was to be discharged from the mortgage in consideration of the delivery of the boy Sam, who was to be retained by the mortgagee as a pledge for the security of the debt, in lieu of Harriett, who was conveyed by the mortgage for the same purpose. Whether the evidence was sufficient to establish such a contract or not is a question we cannot review—the sufficiency of the evidence is a matter purely for the jury, and if they erred in their conclusion of the fact, the plaintiff could only obtain relief by

a motion for a new trial. But that the evidence was admissible and the charge appropriate, as applied to it, we entertain no doubt.

In the case of Ranley v. Rice, 10 Metc. 7, it is said if a mortgagor of a chattel make a new and distinct contract with the mortgagee, by which he delivers to him not only the mortgaged chattel, but also other chattels not mortgaged, to be held by the mortgagee as a security for the debt, the mortgagee by such new agreement becomes the pawnee of all the chattels so delivered, as well those previously mortgaged as those that were not. The propriety of this decision is manifest when we reflect that the title to personal property may pass by parol, and the fact that the instrument that conveys the title to the owner is under seal, cannot restrain or control his right or capacity to convey it by parol or mere delivery. A mortgagee may then release his mortgage by a sufficient parol agreement, although the mortgage be under seal and the debt unpaid.

2. The writ in this case was issued twenty-four days before it was served. The sheriff took possession of the slave, as the plaintiff had made the affidavit and given the bond required by the statute, and the defendant on the day of the service of the writ executed a replevy bond in the usual form. On the trial the plaintiff requested the court to charge the jury that the replevy bond estopped the defendant from denying that he was in possession of the slave when the writ was issued. The plaintiff is bound to prove that his cause of action occurred before the suit commenced—therefore, it was incumbent on him to show that the defendant was guilty of an unlawful detainer anterior to the time of issuing the writ. The bond, however, is an admission, that he was in possession at the time the writ was executed, and is therefore a circumstance tending to prove that the defendant was in possession anterior to that time, and in the absence of all other proof, the jury might well find that the defendant was in possession at the date of the writ. But this may be repelled by proof to the contrary, as the bond contains no recital showing that the defendant was in possession previous to the day the writ was executed. The bond estops the defendant from denying that the defendant was in possession at the date of the service of

the writ, but as no admission or recital is contained in it showing possession anterior to that time, it cannot preclude the defendant from showing that at the date of the writ he had not the possession and was not guilty of the unlawful detainer.

We are satisfied that the Circuit Court ruled the law correctly, and the judgment must therefore be affirmed.

WARE & COWLES *vs.* DUDLEY.

1. Non-assumpsit *infra sex annos* is a good plea in *indebitatus assumpsit.*
2. To support a count on an account stated, it is not necessary to prove that there had been different items of account, cross demands, or mutual dealings between the parties: The admission of a certain sum due, in respect of a demand for which an action would lie, is evidence sufficient to sustain it.
3. Where the court gives an *affirmative* charge, which asserts an erroneous legal proposition, the presumption is, in the absence of every thing to exclude it, that there was some evidence on the point, that called for instruction, although none appears in the bill of exceptions.
4. A pleading is to be taken most strongly against the party whose pleading it is; and where the plaintiff, in his replication to a plea of the defendant, avers that the promise alleged was to pay out of the proceeds of a note, "when said note was collected," the averment must be understood to mean when the *whole* amount was collected.

Error to the Circuit Court of Macon. Tried before the Hon. J. J. Woodward.

THE plaintiffs sued the defendant in error in *indebitatus assumpsit*, and to the money counts added a count on an account stated. The defendant pleaded the general issue, and as his third and fourth pleas the statute of limitations—avering in the third that he did not "*undertake and promise within six years next*," &c., and in the fourth that he did not "*undertake and promise within three years next*," &c. To each of these pleas of the statute of limitations, the plaintiffs demurred, but the court overruled the demurrers. They then took issue on the fourth plea, and replied to the third that on the — day of —— 1840, the defendant had in his possession a promissory

note executed by John and Andrew Gibson, due on the 25th December 1841, for the sum of two thousand dollars—three-fourths interest in which belonged to Geo. W. Dillard and Alexander Burns; and that the defendant, at the request of Dillard and Burns, who were indebted to the plaintiffs by note in the sum of $875 95, promised to pay the plaintiffs the amount due on said note of Dillard and Burns out of the proceeds of said note executed by John and Andrew Gibson, when said last named note was collected, &c., and that the said note of John and Andrew Gibson was collected by the defendant within less than six years next before this suit was instituted, &c.

By the bill of exceptions it appears that the indebtedness of Dillard and Burns to the plaintiffs and of John and Andrew Gibson to the defendant were proven as stated in the replication, as well as the interest of Dillard and Burns in the note of the Gibsons. The evidence tended further to show that the plaintiffs in 1839 or 1840 delivered the note of Dillard and Burns to one Brazill, for the purpose of endeavoring to secure the payment thereof out of the proceeds of the note due by the Gibsons, and that Brazill had an interview with the parties, in which Dillard, Burns and the defendant agreed that, if the plaintiffs would allow an offset that Dillard and Burns claimed against them, they would endeavor to get the Gibsons to divide the note due by them and to execute one to the plaintiffs for an amount equal to the balance due to the plaintiffs on their said note against D. and B., or if the Gibsons refused to do so, that then the defendant would execute to the plaintiffs a note for that amount, and that they would meet said Brazill at his house on a named day, some two or three weeks thereafter, to carry out the arrangement. It further appears that they did not meet Brazill on the appointed day, but went to his house a day or two after to perfect the arrangement, but Brazill having given up the note to the plaintiffs, nothing further was done. The defendant collected all the money due on the note of the Gibsons in cash, except $150, and for the balance of $150 took a new note from John Gibson, which he passed to one Felton in discharge of a debt due by defendant to one Abbott, before the institution of the suit. The defendant on the cross-examination of Brazill asked him if he did not, on a

day and at a place which were named, inform John Gibson that the matter was not settled, because Ware, one of the plaintiffs, refused to allow the offset claimed by Dillard and Burns, to which he replied in the negative. The defendant offered to prove by John Gibson, that Brazill did so inform him on the day and at the place named; the plaintiffs objected to the proof, but the court overruled the objection. The court charged the jury: 1st—that under the count on the account stated, the plaintiffs could not recover, without showing that there were matters of account between the plaintiffs and defendant; 2d—that under the issue formed on the replication to the plea of the statute of limitations of six years, the enquiry for the jury was whether the whole of the note on John and Andrew Gibson had been collected before the suit was instituted and within six years next before its institution, and unless they should find that the whole had been collected within the six years, the replication was not sustained.

The plaintiffs excepted to the ruling and charges of the court, and now assign them as error.

Rice and Belser, for plaintiffs in error:

1. The decisions of the court upon the several demurrers are erroneous.

2. A plaintiff is entitled to recover, under the *insimul computassent* count, upon proof of any admission of indebtedness, although it may be only a *single* item of indebtedness. The charge is erroneous which asserts that plaintiffs could not recover, unless there were "*matters of account*" between the parties. This charge could not fail to work injury to plaintiffs in such a suit as this.

3. All the questions raised in the record are insisted on by plaintiffs in error.

Gunn, with whom was N. W. Cocke, for defendant:

1. The demurrer to the 3d and 4th pleas was properly overruled. Non-assumpsit *infra sex annos* is the proper plea in *indebitatus assumpsit*.—3 Chitty's Pl. 939, note f. and citations.

2. The first charge is somewhat indefinite and is certainly wanting in precision, but is not so manifestly erroneous as to reverse the case. The plaintiffs should have asked an expla-

nation and that it be made more specific.—Caskey v. Haviland, et als. 13 Ala. Rep. 314; Hodges v. The Br. Bank, 13 ib. 455; Kenan v. Holloway, at January term, 1849.

3. There was no error in the ruling of the court upon the testimony. The defendant had a right to impeach the plaintiffs' witness in the way he did.

4. The whole facts of the case, as made out by the plaintiffs, show that they had no cause of action. The ruling and charges of the court, if all were erroneous, could therefore do them no injury.—13 Ala. Rep. 517; 3 ib. 599; ib. 419; 2 Howard, (Miss.) 662; 1 Missouri, 318; 4 Ohio, 388.

PARSONS, J.—As the second plea was withdrawn it may be left out of view, and we think the demurrers to the third and fourth pleas were correctly overruled. The questions of law arise upon the count on an account stated and the bill of exceptions. It does not appear that there was any exception or charge touching the contract or proposition of the defendant as proved. The whole evidence in regard to it is, perhaps, not stated in the bill of exceptions. We refer to the question whether the defendant was ever bound by his offer or agreement, as it appears by the evidence, so far as that is stated in the bill of exceptions, to have been made on condition, that the plaintiffs were to allow a set-off, which Dillard & Burns claimed, and it does not appear to have been proved that the plaintiffs ever allowed, or agreed to allow the set-off. It was, therefore, a question if the defendant might not retract his offer at any time before it was acceded to by the plaintiffs. But with these questions, or with any question concerning the consideration of the defendant's alleged agreement, we have nothing to do at present.

If Brazill is the witness by whom the plaintiffs proved the alleged agreement of the defendant, and if he proved that it failed in consequence of any omission on the part of the defendant, then the defendant, on cross-examination, had a right to ask him if he did not, at a particular time and place, inform Gibson that the matter was not settled, because one of the plaintiffs refused to allow the set-off. And as Brazill denied this, the defendant had a right to prove it by Gibson. As already intimated, the bill of exceptions is obscure in this part,

and it does not even show that Gibson actually testified. We cannot reverse on this exception.

In the next place, the court charged that the plaintiffs could not recover under the count for an account stated, without showing that there were matters of account between the parties, and the plaintiffs excepted. This charge implies that there must have been different items, or cross demands, or mutual transactions, and in this there was error.—Brown on Actions at Law, 548. In Porter v. Cooper, 1 C. M. & R. 387, &c., Alderson B. said, "the cases have come to this, that an admission of a certain sum being due in respect of a demand for which an action would lie, is evidence sufficient to support an account stated." It is not necessary, for the purpose of supporting this count, that the plaintiff should give evidence of the several items constituting the account, but it is sufficient if he prove the account stated, for that is the cause of action.—Bartlett v. Emery, 1 T. Rep. 42. It is, therefore, evident that this charge threw the burthen of unnecessary proof upon the plaintiffs. This exception was not taken for a refusal to instruct. If it had been, the bill of exceptions should have stated so much of the evidence as was necessary to show that the charge ought to have been given. But the charge was given against the plaintiffs, and as a proposition of law, we think it was erroneous. In this view of the question we must presume that there was some evidence in the cause which called for instructions on the point, although such evidence may not appear by the bill of exceptions.—Peden v. Moore, 1 Stew. & Por. 71; Tharp v. The State, 15 Ala. Rep. 749. The court further charged, that under the issue formed on the replication to the plea of the statute of limitations of six years, which is the third plea, the enquiry for the jury was whether the *whole* of the note on the Gibsons had been collected by the defendant before this suit was commenced, and within six years of the time it was commenced, and there was an exception to this charge.

The replication states that the defendant promised to pay to the plaintiffs the amount of their debt against Dillard & Burns "out of the proceeds of said note executed by John & Andrew Gibson, when said note was collected," and then the replication avers that the same was collected within six years

next before this suit was commenced. If we take the defendant's promise to have been precisely as it is alleged in the replication, then it was a promise to pay when the note was collected, that is to say, the whole note; or more properly, the whole amount secured by it. Adhering to the letter of such a promise, this, we think, would be its effect. The whole amount of a note cannot be considered as collected, so long as a part remains unpaid. The full collection was the event on which the promise, taking it literally, was to be performed. It may be that the defendant had received enough on the note to discharge the plaintiffs' claim, but if it were his contract to pay when the whole amount should be received, we cannot say that part was equivalent for this purpose to the whole. In saying that, we should assume the power of modifying the the contract of the parties, not of expounding it. It may be admitted that the promise, as stated in the replication, does not show the real intention of the parties with any certainty. This we feel and admit, and it follows that the promise in this respect is doubtful. But in all doubtful questions of the kind, the safe rule is to adhere to a literal construction, so long as that is not absurd or clearly unreasonable. It may have been the real intention of the defendant not to bind himself to pay until he received the whole amount of the note on the Gibsons. It appears by the replication that he owned a portion of the note himself—that the residue belonged to Dillard & Burns. It does not appear by the replication that he promised to pay their debt out of his portion. To avoid the necessity of this, it may have been his intention not to bind himself to pay until he had received the whole amount. Then he would certainly have enough without appropriating his own part—hence, a literal construction in this case is not clearly unreasonable. This appears to have been a parol promise, not in writing. We do not mean to say that the particular words that the parties may chance to use in such contracts must in all instances have their usual effect. That should never be when it would violate their clear intentions. In such cases, however, these contracts should be stated in the pleadings according to the real intention of the parties, or, in other words, according to their legal effect. The evidence is another thing—if that proves that they employed words, which did not aptly ex-

press their meaning, they can be rejected or qualified, so as to carry out the real intention of the parties. But the replication in this case states a promise, the effect of which, as stated, was to pay after the defendant had collected the whole amount of the note, and it avers that he did collect it all. A pleading is taken most strongly against the party whose pleading it is. We think there is no error in this charge. The court qualified the charge, but as the qualification was favorable to the plaintiffs and not excepted to, it is not necessary to notice it.

It is not necessary to decide the last exception. Let the judgment be reversed, and the cause remanded.

ADAMS *vs.* DAVIS.

1. A. and D. entered into a verbal contract, by which A. undertook to sell and deliver to D., at a certain time and place, fifty bales of cotton, and D. to pay him therefor ten cents per pound. About the time fixed on for the fulfillment of the contract, the parties agreed that the time of performance should be postponed to another named day, and that their contract should be reduced to writing, which, however, was never done. On the day last appointed, D. and the agent of A. met at the place designated for the delivery, when D. took the agent aside and said to him that A. ought to let him off from the contract, but the agent proceeded to tender him the cotton, which he refused to accept and pay for: *Held*—That in an action by A. for a breach of the contract, *the question*, whether the parties intended by the second agreement that the contract should be no longer binding, unless reduced to writing, or whether they intended merely that it should be reduced to writing, with the view of being mutually furnished with more certain evidence of what the contract was, is one of fact, and should be left to the determination of the jury.
2. The pleader need only state so much of a contract as shows the plaintiff's right to recover: He may state it according to its legal effect, and is not bound to state that which is merely matter of evidence.

Error to the Circuit Court of Macon. Tried before the Hon. J. J. Woodward.

The facts of this case are fully set out in the opinion of the court.

Cocke, for plaintiff in error.

Gunn and Rice, for defendant:

The charges asked were properly refused—not only because they are contrary to law, but because they are abstract. The first seeks to qualify the inducement to have the contract reduced to writing, without any evidence upon which to base such qualification, and further to make the intention of the parties, aside from the contract, and not the contract, the governing principle. The second charge attempts to deduce a conclusion as to waiver of one of the terms of the contract, adverse from the evidence, and further to submit a question of law to the consideration of the jury.

In declaring on a contract, the declaration must show a binding agreement between the parties, and a violation by the defendant; and if the promise of the plaintiff forms in part the inducement to the promise of the defendant, the plaintiff must aver and prove a readiness on his part. Jones v. Powell, 15 Ala. Rep. 824.

If in this case there was a contract between the parties, there is a variance between that disclosed in the pleadings and proof. Where a special agreement is declared on, the same must be proved as stated, and a variance will be fatal. Shepard v. Palmer, 5 Conn. 95; Bannell v. Tailor, 5 ib. 273; Hough v. Young, 1 Ham. 504; Malford v. Bowen, 4 Halst. 315; Stanwood v. Scovell, 4 Pick. 422; Adams v. Bower, 4 Litt. 7; Simpkins v. Montgomery, 1 N. & M. 589.

A contract is a deliberate engagement between competent parties upon a legal consideration.—Story on Con. 1. There should be a reciprocal assent—the minds of the parties should agree.—Ib. 52. It must be mutual, and everything must be done which the stipulations required to be done.—Newland on Con. 152. If we apply the tests here laid down to the contract as set out in the bill of exceptions, then in fact no contract has been made; and until the same was reduced to writing, there was no contract between the parties; neither is there any averment on the part of the plaintiff of performance or an offer to perform. When, by the terms of a contract, acts are to be performed by each party, neither can maintain an action against the other, without performance or an offer to

perform; and when the same is required to be reduced to writing, or to be executed by both parties, it is imperative; until the same has been done, each one having a right to stand by the terms and stipulations agreed upon. Hare v. Huntington, 3 Ship. 350; Stabler v. Cunman, 7 Gill & Johns. 284; Luey v. Bundy, 9 N. Hamp. 298; Eleasen v. Henshaw, 4 Wheat. 228; Tucker v. Word, 12 Johns. 190; Wood v. Edwards, 19 Johns. 212.

Where there are special and common counts in the declaration, and the special contract is proven, and evidence is given varying the special contract by the parties, plaintiff cannot recover upon either the special or common counts. Norris v. Durham, 9 Cow. 151.

The charges asked were properly refused, because *the contract supposed or admitted in those charges is not the contract set forth in either count of the declaration.* It was not a term of the contract declared on, that "*the whole contract should be reduced to writing.*" But this is a term or part of the contract proved and admitted in each of the charges asked. For this variance between the contract declared on and the contract embraced in the charges requested, these charges were rightly refused.

CHILTON, J.—This was an action of assumpsit brought by the plaintiff in error against the defendant, upon a contract alleged to have been entered into between them, by which the plaintiff agreed that he would deliver to the defendant, at the Rail Road Ware-house in Montgomery, fifty bales of ginned cotton of the plaintiff's first gathering and packing from his crop then growing, to be delivered by the first day of November then next (1847,) and that the defendant should then and there accept said cotton, and pay said the plaintiff therefor ten cents for each and every pound thereof.

The declaration contains three counts, the last of which was however abandoned upon the trial in the court below. The first count, after setting out the contract as above stated, and avering that the mutual promises of delivery of the cotton on the one hand, and the payment of the money on the other, formed the consideration to support the same, contains the further averment that afterwards the parties mutually agreed to postpone the time for the performance of the said contract from

the first of November 1847, until the fifteenth day of January 1848, but that in all other respects said original contract remained unaltered. The count then proceeds to aver the tender of the cotton and the ware-house receipts by the plaintiff to the defendant at the time and place last agreed on, and the defendant's refusal to accept the cotton and to pay for the same. The second count avers the agreement to deliver the cotton on the 15th January, without setting out the original contract, and alleges a similar tender of performance on the part of the plaintiff, and refusal on the part of the defendant, &c. Plea, *non-assumpsit.* Verdict and judgment for the defendant.

Upon the trial, the plaintiff took a bill of exceptions, by which it appears that he introduced evidence, tending to prove a contract made between the plaintiff and defendant in September or October 1847, by which the plaintiff agreed to sell and deliver to defendant, at the Rail Road Ware-house in Montgomery, by the 1st November 1847, fifty bales of cotton of the first picking and packing of his then growing crop, and said defendant, upon the delivery thereof, agreed to pay the plaintiff the sum of ten cents per pound therefor. It was also shown that about the time for the delivery of the cotton according to the terms of the above contract, the plaintiff and defendant had an interview, immediately after which they came before two persons, who were examined as witnesses in the court below, when the plaintiff observed that the time for the delivery of and payment for the cotton had been prolonged until the middle of January, to which the defendant assented. Plaintiff also said that he and defendant had agreed that their contract should be reduced to writing. The defendant asked who should draw up the writing. Plaintiff replied that Knox (one of the witnesses) should, and that defendant could sign it and leave it with him, Knox, and plaintiff would sign it on his return from Montgomery. Knox asked how the contract should be drawn up. Plaintiff replied—"state what the contract is,—fifty bales of my first picking to be delivered in Montgomery by the middle of January, and defendant to pay for it ten cents per pound." It appeared, however, that the agreement was never reduced to writing. The plaintiff also showed that he had, at the time last agreed on, viz. the 15th January

1848, fifty bales of his first picking and packing at the ware-house in Montgomery, as agreed upon; that he sent his agent on said day to make delivery thereof to the defendant; that the defendant appeared in Montgomery on said day, and taking the agent aside, said to him, the plaintiff ought to let him off from the contract, but said agent in behalf of the plaintiff tendered to the defendant the fifty bales, as also the ware-house receipts therefor, and defendant refused to receive and pay for the same; and that such cotton, on the 15th January 1848, was worth only about seven cents per pound. Thereupon, the plaintiff asked two charges to be given by the court to the jury, as follows:

1st. That if they believed from the evidence that there was a contract between the plaintiff and the defendant, by which the plaintiff was to deliver to the defendant, at the Rail Road Ware-house in Montgomery, fifty bales of cotton of his first picking and packing, by a certain time, and that afterwards the parties agreed to extend the time of delivery and payment to the 15th January 1848, and also agreed at the time of such extension that the whole contract should be reduced to writing, merely for the purpose of having more certain evidence of what the contract was, and not as a condition, without the performance of which the contract was to be inoperative, and if they should also believe that the plaintiff, on the 15th January 1848, tendered the cotton to the defendant and he refused to accept and pay for it,—then the plaintiff was entitled to recover.

2d. That if the jury should believe from the evidence that there was a contract between the parties, by which the plaintiff agreed to deliver to the defendant, at the Rail Road Ware-house in Montgomery, fifty bales of cotton of his first gathering and picking, at a certain time, and that afterwards the parties agreed to extend the time for the delivery of the cotton to the 15th January 1848, and also agreed at the time of such extension that the whole contract should be reduced to writing, but which writing was not executed as agreed on, and that said defendant afterwards, on the 15th January 1848, with a knowledge of the fact that the contract had not been reduced to writing as agreed on, acknowledged to the agent of the plaintiff the validity of the previous contract, that this might

be considered by the jury as a circumstance from which they might infer a waiver of that part of the agreement, that the contract should be reduced to writing, and that if the cotton was tendered on the 15th January 1848, and the defendant refused to accept and pay for it, then the plaintiff is entitled to recover.

These charges the court refused to give, and the plaintiff having duly excepted to such refusal, now assigns the same for error in this court.

There can be no doubt, but that if a contract was entered into, such as is described in each of the two first counts in the declaration, and the plaintiff has tendered a compliance on his part as stated, he is entitled to his action; since the law is settled that reciprocal promises, simultaneously made, to sell and deliver goods on the one side, and to pay for them on the other, are valid.—Story on Con. 82, § 12; 8 Johns. Rep. 304. This position is not gainsaid by the counsel, but they insist that this contract was not complete, since it was agreed that it should be reduced to writing, which was never done. The proof conduced to show that a valid contract for the sale and delivery of the cotton, on the 1st of November 1847, existed verbally at the time the parties agreed to postpone the time for performance to the 15th day of January 1848. After this agreement to postpone, the contract in legal effect became one for the delivery of the cotton and payment of the money on the day last stipulated, and might well be declared on as such. This the second count does. If it was a part of the contract that it should not operate until reduced to writing and signed by the parties, then it would be incomplete until the performance of the condition, upon which it was to take effect, and as it would remain incomplete until the condition was complied with, the parties respectively would retain until then the *locus penitentiæ*, and might abandon it, or refuse to complete it.

Whether, by the agreement of the parties, the contract was complete, or its consummation depended upon some subsequent act to be performed by them respectively, was, under the circumstances of this case, as presented by the record, a question of fact, which should have been left to the jury. Did they make a verbal contract for the sale and delivery of the cotton on the 1st November 1847? When the time for per-

forming that contract arrived, did they, without intending to abandon the previous contract, still adhere to it, but merely postpone the time for its performance? Did they intend that this verbal contract, so modified, should be obligatory and binding as a parol or verbal contract, or was it only to become operative upon the condition that it should be reduced to writing? In fine, was it merely designed by the agreement to reduce the contract to writing, that they might mutually furnish each other with more certain and permanent evidence of a subsisting valid verbal contract? These are questions of fact, dependent upon the intention of the parties, and not of legal construction. If this view be correct, it follows that the first prayer for instructions was strictly correct, and the charge should have been given: For it is very clear that if the agreement was complete without the writing, it was wholly unnecessary for the pleader to say anything of the promise to furnish the evidence of the contract, and which neither party had fulfilled; so that if the jury should find that the agreement to reduce to writing was not a condition upon which the contract was to become operative, but was designed as a matter of caution or convenience—furnishing evidence, as the charge prayed for assumes—then the facts proved would sustain the count; if they found for the plaintiff, the other facts stated in the charge, and the supposed variance between the declaration and the proof, would not exist. The pleader need only state so much of a contract as shows the plaintiff's right to recover; he may state it according to its legal effect, and is not bound to state that which is merely matter of evidence.—Blick v. Briggs, 6 Ala. Rep. 687; Brown v. Barnes, ib. 694; see also Allen v. Goff, 13 Verm. 148. So, in the case before us, if the agreement to reduce the contract to writing was not a condition upon which it was to be obligatory, then the averment of it would be wholly immaterial, and might properly be rejected as surplusage.

As the view we have taken of the law applicable to the first charge is decisive of the case in this court, it is unnecessary to notice the points raised upon the other, further than to state that although the statement made by the defendant to the agent of the plaintiff, that he ought to let him off from the contract, was a circumstance tending to show either that he did not

regard the promise to reduce the contract to writing, as a condition upon which its validity depended, or that constituting such condition, he had waived it, still it was for the jury to weigh it, and to attach to it such importance as in their opinion it deserved. The second charge seemed to place the evidence in a proper light before them.—6 G. & J. 157.

We do not think the charges were abstract, as insisted on by the defendant's counsel. The evidence was that the parties agreed to reduce "*the contract to writing*;" the charge asked for assumed, the evidence tended to show that the *whole* contract was to be afterwards put in writing. This is but a verbal criticism, and too refined to furnish any substantial ground for refusing the charge.

Judgment reversed and cause remanded.

McREA ET AL. *vs.* THE INS. BANK OF COLUMBUS.

1. When an attorney, employed to collect money, is called on for a settlement, his admission of the amount collected is competent evidence against his client, but the client may nevertheless show by other proof that the fact admitted did not in truth exist.
2. The allegations of a bill not sworn to by the complainant are to be considered as the mere suggestions of counsel, but those contained in a bill, which is verified by him, are competent evidence against him.

Error to the Circuit Court of Barbour. Tried before the Hon. Sam'l Chapman.

The facts of this case are set forth at length in the opinion of the court.

P. T. SAYRE, for plaintiff in error:

1. The judgment of the County Court was erroneous. Upon the verdict of the jury, the judgment should have been so as to satisfy the original judgment as to the $5190, and the court should have ordered satisfaction for that amount to be entered.

2. The court ought to have given the charge first asked,

for, as the payment of the judgment to the attorney of the plaintiff was tantamount to a payment to the plaintiff himself. Hudson v. Johnson, 1 Wash. 10; Langdon v. Potter, 13 Mass. Rep. 320; Lewis v. Gamage, 1 Pick. 347; Commissioners v. Rose, 1 Dessaus. 469.

3. Pettit having power, as the attorney of the plaintiff, to satisfy and settle said judgment, his admissions and declarations were competent.—7 Cow. 739; Erwin v. Blake, 8 Pet. 18; 1 U. S. Dig. 329; Story on Ag. 156–7.

4. Pettit was the attorney, he was called upon for the purpose of having a settlement, and his declarations made at the time were admissible as part of the *res gestæ*.—1 Greenl. 198.

No counsel for the defendant.

DARGAN, C. J.—The facts of this case appear to be these: The Insurance Bank of Columbus recovered a judgment against Seth Lore, on which an execution was issued and placed in the hands of Duncan McRae, as sheriff of Barbour county. He failed to make the money, and the Bank moved for judgment against him and his securities, suggesting that he could have made the money with proper diligence. The sheriff and his securities appeared and admitted the facts alleged in the suggestion, and confessed judgment in favor of the Bank for the sum of six thousand seven hundred and eighty-one dollars. On this judgment executions from time to time have been issued. At the February term of the County Court, A. D. 1849, McRae, the sheriff, and his securities moved the court to enter satisfaction of said judgment, alleging that it had been paid. An issue was made up involving the inquiry whether the judgment had been paid, and submitted to a jury who returned a verdict that five thousand one hundred and ninety dollars had been paid on the judgment, but that the residue was still due and unpaid. On this verdict the court dismissed the motion to enter satisfaction at the cost of the plaintiffs in error. On the trial of the issue, a bill of exceptions was taken to the ruling of the County Court, the material facts of which appear to be that Seth Lore, the original debtor, deposited the money in the hands of Mr. Pettit, the attorney of the Bank, to pay the judgment against the sheriff, and his securities, but Pettit subsequently allowed Lore

to draw a portion of this money out of his hands. It also appeared that Thomas Lamply, one of the securities of the sheriff, and Thomas F. Foster, an attorney of the Bank, called on Mr. Pettit for the purpose of making a settlement. Pettit then admitted, that he had in his hands money sufficient to satisfy said judgment, less one hundred dollars, which had been deposited with him by Lore, for the purpose of paying said judgment, and he then gave to Lamply a written order to the coroner, who had the execution for collection, directing him to stay proceedings on the execution. The Bank then introduced a bill filed by Duncan McRae, in the Chancery Court of Barbour, praying an injunction against the execution for the purpose of showing the amount that McRae admitted to be due on said judgment. Some of the securities against whom the judgment was rendered were joined as complainants in the bill—the others were parties to the bond for the injunction. The plaintiffs objected to the admission of this bill as evidence, which objection was overruled by the court. On this evidence, the plaintiffs by their counsel requested the court to charge the jury, 1st, that if they believed that Pettit was the attorney of the Bank, and that a sum of money sufficient to satisfy the judgment had been deposited with him, that this was a satisfaction of the judgment. 2d. That if they believed that Pettit, the attorney of the Bank, admitted to Lamply that he had in his possession an amount sufficient to satisfy the judgment, less one hundred dollars, and then gave an order to the coroner to stay proceedings, then they could only find in favor of the Bank the amount claimed to be due by Pettit with interest, which charges the court refused, and charged the jury that the admissions of Pettit could not be received as evidence although his acts could. The plaintiffs excepted to the ruling of the County Court and presented a writ of error to the Circuit Court, and in that court assigned the matters contained in the bill of exceptions as error. The Circuit Court affirmed the judgment of the County Court, and the cause is brought into this court by a writ of error to the the Circuit Court.

1. The admissions of an agent become evidence against the principal to the extent that he has authority to make them. When this authority is implied from the authority given to do

a certain act, the admission must be connected with the act, that is, it must be a part of the *res gestæ*. If the declarations of the agent be entirely disconnected with any act or duty he has undertaken to perform, the authority to make them cannot be implied, and they become mere hearsay, and consequently inadmissible.—1 Greenl. Ev. §§ 114; 2 Cowen & Hill's notes to Phil. Ev. 180, n. 182. In this case Pettit was employed by the Bank to collect the money. As an attorney he had therefore authority to receive it, and when it was received and he was called on for a settlement it became his duty to inform the Bank of the amount collected by him. The admission then made of the amount received from Lore was in the performance of his duty, and that duty resulted from an act he was authorised to perform, to wit, to receive the money. Such an admission was within the scope of his authority, connected with the acts he was authorised to perform, and therefore part of the *res gestæ*, and consequently admissible. The State Bank v. Wilson, 1 Dev. 484; Thallheiner v. Brinckerhoff, 6 Cow. 90; 11 Johns. 70. It is not, however, to be understood that such admissions are conclusive evidence to establish the facts they tend to prove, for although the admissions of an agent constituting a part of the *res gestæ* are evidence against his principal, yet it is competent for him to show that these admissions were improperly made, and that the facts they tend to prove do not in reality exist. Notwithstanding therefore Pettit admitted the payment of the money under circumstances that render such admissions evidence, yet it is entirely competent for the Bank to show by other proof that the money in fact was not paid. The court, however, instructed the jury that these admissions made by Pettit were not to be regarded as evidence. This was erroneous. The admissions being competent testimony, were to be weighed by the jury, and such credence given to them as the jury might consider they were entitled to under all the circumstances of the case.

2. In reference to the bill filed by McRae to enjoin the judgment and which was admitted as evidence to show the amount that McRae acknowledged to be due on the judgment, at the time bill was filed, we will merely say that if it was not sworn to by McRae, it was improperly admitted.—Adams

v. McMillan, 7 Porter, 73; Phillips Ev. vol. 1, 358. But we think if the bill was sworn to by McRae, the facts and allegations contained in it become evidence against him. The reason why a bill not verified by the oath of the complainant is not evidence against him is, that the allegations are to be considered as the mere suggestions of counsel. But we cannot suppose that the allegations of a bill sworn to by the complainant are the suggestions of counsel merely, but must consider them as the statement of facts known to be true. The answer of a defendant under oath has always been received as evidence against the party who makes it, and we see no reason why a bill which is verified by the oath of the complainant shall not also be received as evidence against him. We do not deem it necessary to examine any other question presented by the record. For the error we have noticed the judgment must be reversed, and the cause remanded for further proceedings.

DORMAN, Guardian, *vs.* OGBOURNE.

1. The Orphans' Court, that has jurisdiction of the person and estate of a minor, has the exclusive authority to appoint his guardian; and the appointment of such guardian by the Orphans' Court of a different county is void.
2. When an Orphans' Court takes rightful jurisdiction of a minor and his estate, it cannot be divested of it, except in cases and under proceedings provided for by the act of the 13th February 1843, and the act of which that is amendatory.

Error to the Orphans' Court of Chambers.

Allison, for plaintiff in error:

1. The record and proceedings of the Orphans' Court of the county of Montgomery, appointing the guardian, are void, it not appearing that the minors were residents of that county. Clay's Dig. 226, § 27; ib. 267, § 1; McCartney, et al. v. Calhoun, et al. 11 Ala. 110; 8 Porter, 375; 2 Ala. 533.

2. There cannot be two guardians acting at the same time by appointments made in different counties.

BELSER & HARRIS, for defendant:

The defendant in error insists that the judgment of the Orphans' Court of Montgomery county appointing the defendant in error, was conclusive on the right of the defendant in error to act as guardian. That the only means in which the appointment of the defendant in error can be enquired into would be by a direct proceeding to have the letters of guardianship revoked by the court granting them, or by a revising court.—Speight v. Knight, 11 Ala. Rep. 455.

PARSONS, J.—The case is briefly this: The plaintiff in error was appointed by the Judge of the Orphans' Court of Chambers county guardian of two minors, Sanders F. Walker and George W. Walker, and at a subsequent time, the defendant in error was appointed by the Orphans' Court of Montgomery county, by separate orders, guardian of each of the minors. This was done while the plaintiff in error was acting under his appointments, and without notice to him. The Judge of the Orphans' Court of Chambers, after this, on the application of the defendant in error, removed the plaintiff from his trusts and revoked his letters of guardianship.

I pass over two questions, which it is not necessary to decide—first, whether or not the defendant in error could join both of the appointments in one proceeding to displace the plaintiff; and secondly, whether the appointments of the defendant were not void, for the want of notice to the plaintiff in error. The question whether the appointments of the defendant in error are not void, on the ground that the Orphans' Court of Montgomery had no jurisdiction of the minors or of their estates, is the question I will examine, and as in general, it is a highly important question, I will state my views at some length.

It is evident from our acts, that the Legislature had a purpose to define questions of jurisdiction among the several Orphans' Courts in relation to the estates of testators and intestates. This has been so well done that a case can hardly arise in which there could be much difficulty in ascertaining to what particular Orphans' Court it belongs. But it is not so clear in respect to guardianship. It does not appear to have been a leading object with the Legislature to distribute this

jurisdiction among the Orphans' Courts, according to the circumstances of the cases. But although it is difficult to find in the language of the general acts any clear declaration to that effect, yet there are particular enactments tending to show this general intent. By the act of 1822, Clay's Digest, 269, § 10, any father may devise the custody and tuition of his infant child to whomsoever he will. The 13th section of this act says, if any guardian (alluding to testamentary guardians) shall fail to appear in the County Court, where such last will shall be proved and recorded, (meaning the will of the minor's father) within the space of six months thereafter, he may be summoned to declare his acceptance or renunciation of the trust. It appears by this, that the County or Orphans' Court of the county, in which the father's will is proved and recorded, shall have jurisdiction of guardians appointed by the will. And further, it appears by the same section, that if such testamentary guardian shall renounce, "the said court may and shall proceed to appoint and qualify some other person or persons to the guardianship, as if no such appointment of a guardian or guardians had ever been made." There is then no doubt about the particular court that is to have jurisdiction of testamentary guardians, or of such as the court may appoint instead of them.

It is very clear that a testator may appoint guardians for some of his children and not for the rest—that might happen if the testator desired to have one or more of his children instructed in a particular business. But it is difficult to imagine that the testator could wish, or that the Legislature could intend, in general, that different and perhaps distant courts should have the appointment of the guardians of the same family of children, without any sort of necessity for it. The 22d section enacts, that whenever there may be any minor in any county, for whom no suitable person will act as guardian, the judge of the County Court shall appoint the sheriff of the county as guardian. The language of this act is general, and includes all minors within the county, for whom no suitable person can be procured to act as guardian. Their residence in that case is the ground of jurisdiction, and this jurisdiction is clearly given to the judge of the County or Orphans' Court, within whose county the Orphan is. This act, however,

could not include minors who were transiently within the county, or such as had guardians rightfully appointed in another county, there being no necessity for any more. But, subject to these qualifications, the act includes, or may include all minors, and it gives jurisdiction to the court of the county where the minor resides. The 26th section, according to the Digest, enacts, that the judges of the several County Courts are to appoint guardians for the estates of those minors in their respective jurisdictions, whose fathers may be still alive, but who have separate estates devised to and settled upon them.

It may be collected from the acts referred to, that the Legislature intended to give jurisdiction of minors and their estates to such of the Orphans' Courts as might be entitled to it according to the circumstances of the cases. In some cases the court, where the will is proved, has exclusive jurisdiction, in others, and generally, I think, the court in which the estate of the father, whether testate or intestate, is administered, has jurisdiction of the minor children, and such jurisdiction is exclusive. In the county in which these courts are held the children usually reside. If some of them have a distinct residence in another county, that, perhaps, might alter the case in most instances.

But there is another general act which I will notice.—Clay's Digest, 302, § 28. According to this, the judges of the several County Courts shall have authority, within their respective jurisdictions, to take cognizance of all matters concerning orphans and their estates, and to appoint guardians, &c. After so many evidences in the acts of a general intent to distribute these cases according to their circumstances among the different Orphans' Courts, I am inclined to think that the words "within their respective jurisdictions," in the last cited act, may be applied to the subject matter of the jurisdiction, and that, therefore, their jurisdiction is limited by that act to all matters concerning the orphans and their estates within their respective jurisdictions.

After a careful examination of the acts cited, to say nothing of some others that I might have brought to view, I think it is clear that the Legislature did not intend to give a general concurrent jurisdiction to all the Orphans' Courts of the State over guardianships and orphans and their estates. Some one

of them has jurisdiction of every case of the kind that can arise, in general, and as that is evident, the object of the Legislature is accomplished. There can be no case without remedy. The court having jurisdiction of any particular orphan and his estate has it exclusively. If all the Orphans' Courts had concurrent jurisdiction of any one case, the very worst abuses might follow. They would be too numerous to mention, but I will suggest one. A citizen of one of our most southern counties might die, leaving his estate and his family all there. It is very clear that his estate could be administered no where else; but if the Orphans' Courts are all to have concurrent jurisdiction of his children, their guardians might be appointed in some of the northern counties, without a single necessity for it, and perhaps, very much against the interest of the minors.

The English law affords very little aid in the investigation of this question. There, the Court of Chancery has properly the jurisdiction to appoint and remove guardians. For this reason questions of jurisdiction cannot spring up there among the inferior tribunals. But it is otherwise in relation to the grant of administrations. If administration be granted there by a court, not having the rightful jurisdiction, it is generally void. For instance—if an intestate have *bona notabilia* in two dioceses, within the same jurisdiction, neither diocesan has power to grant administration, but it should be done by the metropolitan of the province, and in such case the grant by the diocesan is void.—Stokes, adm'r v. Bates, 5 B. & C. 491, and see 1 Saunders, 275, notes. And it has been held in N. Carolina, that when a citizen of that State died, letters of administration of his estate, granted by the court of a county where he never resided, nor had any assets at the time of his death, were void. Collins v. Turner, N. C. Term Rep. 105; Hyman v. Gaskins, 5 Iredell Rep. 273. The same thing no doubt would be held here; and it would be difficult to make a distinction between the appointment of an administrator and a guardian in this State, so far as the present question is concerned; for they are both appointed by the Orphans' Courts, and, in both cases, it is necessary that any one of those courts, acting on these matters, should be confined to the cases that come within its particular jurisdiction.

But there is a further view of the general subject that seems to be appropriate to the case before us. I think it results from our legislation, that if a particular Orphans' Court having jurisdiction at the time of an orphan and of his estate, appoints a guardian of them both, that court has the exclusive jurisdiction afterwards, and there is no authority for another Orphans' Court either to remove such guardian or to supersede him by a new appointment. This is directly contrary to the opinion of the Court of Appeals of Kentucky, in Montgomery v. Smith, 3 Dana, 599. That opinion is no doubt consistent with the laws of that State, but I think it is opposed to ours. Here, the guardian is appointed by the proper court—he takes the oath and gives bond—he may be ordered to give further security; he returns to that court an inventory, the court audits his accounts and reports them to the next term for allowance; orders sales of the estate of the ward in some cases—preserves all documents, which may be evidence afterwards, and finally makes a decree on final settlement, which is to have the effect of a judgment, and on which the ward may take out execution against the guardian, and if that is returned without satisfaction, can have an execution from the same decree against the guardian's sureties. It is, therefore, very clear that when an Orphans' Court takes rightful jurisdiction in these cases, it has a right to go entirely through with them, and that another Orphans' Court cannot take this jurisdiction away. It is very true, that a minor, becoming fourteen years of age, may choose a guardian, and that guardian will supersede the previous guardian, but this choice must be made in the court which has already possession of the minor and his estate. That court may displace the guardian first appointed, in other instances also, and appoint another. As to the case before us, we think the appointments of the defendant in error by the Orphans' Court of Montgomery were void, because that court does not appear to have had any jurisdiction, and that the Orphans' Court of Chambers consequently erred in removing the plaintiff in error and in revoking his letters of guardianship. The choice of the elder of the two wards could have no effect in this case. The contest was between a guardian claiming under a void appointment and one whose appointment we infer was regular and rightful.

Let the order and decree of the Orphans' Court of Chambers be reversed, and the plaintiff in error will recover the costs of this court and of the court below against the defendant. I have examined the case of Speight v. Knight, 11 Ala. Rep. 461, cited by the counsel of the defendant in error. There, the second guardian was appointed by the court in which the first was appointed—by the court which had jurisdiction of the first guardian, of the ward of and his estate. If the appointment of the second guardian, without notice to the first, in that case was not void, it does not follow that the appointment of the second guardian in this case is not void, for in this case, it does not appear that the wards ever resided in Montgomery, or had any estate there. The evidence offered upon this point was in effect nothing. The proceeding by which the defendant in error was appointed in Montgomery was *exparte*, and without notice to the plaintiff, who was therefore no party to the proceeding, nor subject to the jurisdiction, he living in another county, in which he had been appointed guardian of these minors.

The act of 13th February 1843, and the act to which that is an amendment, (Clay's Dig. 271, §§ 20, 21, 25,) make, in very special cases, provision for the removal of the property of the minors. It is possible that cases of the appointment of guardians in a different county might arise, under these acts, which would form exceptions to the principles of this opinion. But it does not appear that the present case is within those statutes, or that it was proceeded in under them.

SHARPE ET ALS. *vs.* HUNTER.

1. If an attachment, sued out in a case in which *just* grounds for it exist, is abated, on plea, for a defect in the affidavit, the party against whom it is issued, in a suit upon the bond, is not entitled to recover the *actual* damages he has sustained.
2. Can *nominal* damages be recovered in such a case?—QUERE.

Error to the Circuit Court of Russell. Tried before the Hon. J. J. Woodward.

This was an action of debt instituted by the defendant against the plaintiffs in error on an attachment bond. It appears by the bill of exceptions that in 1846, the plaintiff in error, Sharpe, sued out an attachment against the defendant in error, and caused it to be levied on a negro woman and child, who were committed to jail and there confined for eight months; that at the time of the suing out of said attachment both the parties to it resided in the State of Georgia, and that the affidavit was defective in not stating that the defendant had not sufficient property within the State of his residence wherefrom to satisfy the debt or demand, in consequence of which a plea in abatement was interposed and the attachment quashed; that the defendant subsequently removed to Russell county in this State, where the plaintiff in error, Sharpe, sued him and recovered judgment on the same demand upon which the attachment had been sued out; and that at the time the attachment issued the defendant in error had some property, but whether it was sufficient to satisfy Sharpe's demand was a disputed question. The court charged the jury, that if they believed that Sharpe sued out an attachment against Hunter, which was abated on plea, then Hunter was entitled to recover the actual damages he had sustained. The defendants below asked the court to charge the jury that although the attachment of Sharpe had been abated, because the affidavit was defective, yet if they found that Hunter did not then have in the State of his residence sufficient property within the knowledge or belief of Sharpe to satisfy said debt, that then Sharpe could properly have taken the affidavit required by law, and his omission to take it and the consequent abatement of the attachment for that cause would only entitle the plaintiff to recover nominal damages, which charge the court refused to give. To the charge given and the refusal to charge as asked the defendants excepted and now assign them as error.

Heydenfeldt, for the plaintiffs in error.

Belser & Harris, for defendant.

CHILTON, J.—The point involved in this case is not free from difficulty. It is this: If just ground for an attachment exists, and one is sued out, but is afterwards abated, upon the

plea of the defendant, for informality in the affidavit upon which it issued, is the plaintiff in the attachment liable in damages upon his bond, and if so, whether for the actual damage sustained, or merely for nominal damages. The court below held that he was liable for the actual damage.

The condition of the bond declared on is, "that the plaintiff should prosecute his attachment to effect, and pay the defendant all such costs and damages as he may sustain by the wrongful or vexatious suing out the said attachment," &c.—This court has several times decided that actions upon the bond, given by the plaintiff in an attachment suit, must be governed by the same rules as are applicable to actions upon the case.—Hill v. Rushing, 4 Ala. Rep. 213; Herndon v. Forney, ib. 243. It has further been held, that if the attachment was wrongfully sued out, but without malice or intention to vex the defendant, that only the actual damage which the party sustained can be recovered; but if both wrongfully and maliciously issued, then vindictive damages may be recovered.—McCullough et al. v. Walton, 11 Ala. Rep. 492; Donnell v. Jones, 13 ib. 490–501.

What is meant by the term "wrongful," as used in the statute to which this bond conforms? Was it, as is contended for by the counsel for the defendant in error, designed to apply to defects in the form of the proceeding, on account of which the attachment should be quashed, as well as to the ground upon which it was to be issued? Or was the object of the framers of the act merely to provide a remedy against persons who should resort to this extraordinary remedy to the prejudice of another, without cause or sufficient ground therefor? It is to my mind perfectly clear, that the latter construction is the correct one. The act of 1837 (Clay's Dig. 61, § 32) provides, that when any original attachment shall have been wrongfully or vexatiously sued out, the defendant may at any time commence suit against the plaintiff suing out the same, and recover any damages which he may have sustained, or to which he may be entitled on account thereof, whether such attachment suit be ended or not. And by the same statute the defendant in the attachment is denied the privilege of putting in issue the grounds upon which it issued. These enactments are conclusive to show that the right to recover damages ex-

ists independent of the judgment to be rendered in the suit by attachment. The rights of the parties then, existing independent of the judgment, cannot be affected by it. But in this case, the judgment, in effect, is held conclusive upon them.—Assuming, what the evidence tended to prove, that good and sufficient ground for issuing the attachment existed, but which the affidavit informally set forth, it is perfectly clear that if an action had been instituted upon the bond before the judgment on the attachment had been rendered, it could not have been sustained, for the simple reason that the attachment was issued upon sufficient ground, and consequently was not wrongfully sued out. If then the action can be maintained after the judgment quashing the attachment, when it could not have been before, it would result that the failure to prosecute to effect the attachment, and not the want of sufficient ground for its issuance, constitutes the gravamen of the suit. But we have shown that this is opposed to both the letter and spirit of the act of 1837, and therefore the construction cannot be supported. Again: Suppose the defendant in the attachment had not availed himself of the informality of the affidavit, or had attempted to avail himself of it, but in some informal way, on account of which his objection proved ineffectual to quash it, and judgment had thereupon been rendered, it would hardly be contended that the action would lie against the plaintiff for this informality in the affidavit, when sufficient ground in fact existed for the issuance of the attachment. Yet its issuance was as wrongful in fact after judgment as before. This shows that the effect of the decision in the court below was to make the party's right to recover depend upon the judgment rendered in the attachment proceedings, and not upon the grounds which existed for its issuance.

We think that, by the wrongful suing out of the attachment, is meant, not the omissions, irregularities or informalities which the officer issuing the process may have committed in its issuance, but that the party resorted to it without sufficient ground. The case of Kirksey v. Jones, 7 Ala. Rep. 622, not only fully sustains this view, but goes quite beyond it. So far as it conforms to this construction of the statute, we fully approve of that decision.

Our conclusion is, that the charge of the court was erro-

neous, and that the charge asked by the defendant below was more favorable to the plaintiff than the court would have been justified in giving at his instance.

Let the judgment be reversed, and the cause remanded.

BISHOP *vs.* BRADFORD.

1. In an action by the holder against the endorser of a note, not negotiable, the insolvency of the maker is not a sufficient excuse for failing to procure a return of no property on an execution against him.

Error to the Circuit Court of Coosa. Tried before the Hon. Geo. D. Shortridge.

This was an action by the plaintiff against the defendant in error as the endorser of a promissory note made by one John W. Bishop. The plaintiff sued the maker to the first court after the note fell due, and recovered judgment against him. Execution issued on this judgment, but was never returned by the sheriff, and the plaintiff neglected to sue out an alias until two years thereafter, when he did so, and procured a return of "no property." Upon this state of facts he obtained a judgment under the charge of the court against the defendant, which was reversed in this court and the cause remanded for further proceedings. The plaintiff, upon the return of the case to the Circuit Court amended his declaration, and set up as an excuse for his neglect to comply with the requirements of the statute, that the said maker was insolvent at the time of the rendition of the judgment, without any visible property, and that he has so continued ever since. The defendant demurred to the declaration as amended, and the court sustained the demurrer, which is the error now assigned.

White & Parsons, for plaintiff:

It is competent for an endorsee to give an excuse for failure to sue out an execution upon the judgment against the maker in an action against the endorser.—See this case, 14 Ala. Rep. 522; Bates v. Ryland, 6 ib. 668; 4 ib. 342.

The allegation of insolvency of the maker is sufficient.—Ivey v. Sanderson, 6 Porter, 429, also above cited case, 6 Ala. Rep. 688; Hall v. Chilton & McCampbell, 3 ib. 633; Hanna v. Pegg, 1 Blackf. 181; Bishop v. Yeazle, 6 ib. 127.

Morris & Taul, for defendant:

The *insolvency* of the maker of a note is the very gist of the action—an assignee cannot recover against his assignor without proof of that fact—by what kind of evidence? By record evidence—the return of no property found by the proper officer. No other evidence is admissible.

Now, it is attempted to dispense with the record evidence required by law, and substitute other evidence, *aliunde*, not only to establish the insolvency, as a fact, necessary to be proved before the jury, but as an excuse for not furnishing the higher and better evidence required by law.

The law says to an assignee, who seeks to recover against his assignor, you must prove the *insolvency* of the maker of the note by issuing an execution and having it returned "no property found." But the assignee says, I am absolved from compliance with the law in this particular, because he was *insolvent.*

The insolvency of the maker of a note might just as well be set up as an *excuse* for not suing at all, as for not issuing an execution after judgment in proper time.

The decision in this case, at a former term of this court, admits that the assignee might have a sufficient excuse for not issuing an execution immediately after the obtention of the judgment, without saying what would be sufficient.

DARGAN, C. J.—When this cause was here at a previous term, we held that the indorsee of a note was required to use due diligence in order to fix the liability of the endorser, not only in commencing his suit and obtaining judgment, but also in issuing his execution and procuring the proper return to be made thereon by the sheriff; and that unreasonable delay in obtaining judgment, or negligence in prosecuting the suit, and procuring the return of no property, would discharge the endorser. The facts as they were then presented to us were, that judgment had been obtained in due time and the execution duly issued, which however, was never returned by the

sheriff, and the plaintiff permitted about two years to elapse before he procured an alias to be issued. We held this to be such negligence as discharged the endorser in the absence of all proof of any excuse for such neglect. The cause was remanded, and the declaration has been amended, by which the plaintiff avers, as an excuse for his neglect in procuring the return of no property, that at the time of the rendition of the judgment the maker of the note, John W. Bishop, was insolvent, and had no visible property out of which the money could have been made, and so continued insolvent up to the time the execution was returned. To this declaration there was a demurrer, which the court sustained. The question therefore presented is whether the insolvency of the maker of the note is a sufficient excuse for failing to have the execution returned no property, in due time after the rendition of the judgment against him.

By the statute law of this State, the endorsee of a note not payable in Bank must do three things before the liability of the endorser is fixed; he must sue the maker in the county of his residence to the first court to which the writ can properly be returnable, he must obtain judgment, and he must have execution returned, no property, by the sheriff. It is true, that an endorser may not be discharged although the holder may fail to perform one or all of these pre-requisites to his right of action, but then he must show a sufficient excuse for such omission. As soon, however, as a sufficient excuse is shown for not performing these pre-requisites to the liability of the endorser, he is absolutely bound and may be forthwith sued. But if the excuse be insufficient altogether to dispense with the performance of any one condition precedent to the liability of the endorser, delay or neglect in the performance of such condition precedent, by the holder, will discharge the endorser, unless he consent to such delay. The holder cannot be permitted to hold the endorser conditionally liable, longer than is necessary to fix his liability, unless the endorser consent thereto, or waive the want of due diligence. It is true that the liability of an endorser may continue conditional under our statutes for many years, as if the suit against the maker be continued from term to term, or if the sheriff shall fail for several terms to return the execution *no property*, in either

case, if the holder be not guilty of neglect, the endorser will continue liable. But when the failure to perform the condition precedent is attributable to the neglect of the holder, it must operate as a discharge of the endorser.

If insolvency will excuse neglect in procuring a return of *nulla bona* for several terms after it could have been done, it will be a sufficient excuse for not issuing an execution at all. We see no middle ground on which we can stand. The neglect must either discharge the endorser, or the excuse must be sufficient to render the performance of the condition precedent altogether unnecessary. If insolvency would excuse the failure to perform one of the pre-requisites, it would excuse the failure to perform all; for we cannot, by judicial construction of our statute, hold, that insolvency will excuse the neglect to procure a return of no property on the execution, but not the neglect of commencing suit and obtaining a judgment: yet it will scarcely be contended that insolvency alone will render all legal proceedings against the maker unnecessary. By the law merchant, the insolvency of the acceptor of a bill, or the maker of a promissory note, would not dispense with a demand of payment of the maker or acceptor, if it could be made—Story on Bills § 324, 9 Mass. 205; 10 Mass. 52; 16 Pick. 392; Ivey v. Hightower, 2 Porter, 308; and as insolvency was no excuse for altogether failing to make the demand, it could not be alleged in answer to negligence in making it, that is, if the demand of the insolvent was not made for several days after the note or bill fell due, and this resulted from the mere neglect of the holder, he could not allege by way of excuse, the insolvency of the acceptor or maker. We think we should be guided in the construction of our statute to some extent by the law merchant, that did not allow the holder to excuse laches or neglect on his part, without the consent of the endorser, but dispensed altogether with the performance of the conditions precedent to the liability of an endorser for a sufficient excuse. We therefore hold, that the insolvency of the maker of a note is not a sufficient excuse for failing to procure a return of no property on an execution, and consequently will not excuse laches and neglect on the part of the holder in procuring it to be done. The plaintiff in error could have issued another execution after the term to which the

first was returnable, and which was not returned—this he did not do, but permitted some fifteen or sixteen months to elapse before he issued an alias. If insolvency will excuse this neglect, and still permit the holder to perfect the return and hold the endorser liable, might not the plaintiff have failed for ten years to procure the return of no property and still hold the endorser liable? The recognition of such a prindiple we think is alike opposed to the law merchant, and to the spirit and intention of our statute.

We think the judgment of the Circuit Court was in strict conformity with the law, and must be affirmed.

LEE, SILLS ET AL. *vs.* SMYLEY.

1. But one tax fee can be allowed in a chancery suit, however numerous the parties, or distinct their interests.

Appeal from the Chancery Court of Lowndes. Tried before the Hon. Jos. W. Lesesne, chancellor.

THE defendant in error filed a bill against the plaintiffs in error, and, after two of them had separately answered, dismissed it. The register in the bill of costs taxed the defendant in error with two solicitor's fees, and the defendant thereupon moved the chancellor for a re-taxation of the costs. The chancellor granted the motion, and ordered the register to tax the defendant with but one fee. From this order the plaintiffs in error appealed and now assign it as error.

G. W. STONE, for plaintiffs in error:—It is contended that each defendant who puts in a separate answer, if he be successful, comes within the plain meaning of the statute, and his solicitor is entitled to a tax fee. The object of the tax fee must have been to take a part of the expense of litigation from the successful (or *innocent*) party, and place it to the account of the party in fault. This being the case, each defendant, unjustly brought into court, comes under the beneficial operation of the statute, and should have his tax fee.

BOLING, for defendant in error:—The Legislature contemplated only one tax fee for each cause, and not one for each answer. (See Clay's Dig. 236—Fees to counsellors and attorneys at law.) If each defendant is entitled to a tax fee, the complainant is entitled to as many tax fees as there are defendants.

CHILTON, J.—The statute declares that the law of costs shall be deemed and held as penal, and no fees shall be taken but in cases expressly provided for by law.—Digest, 239, §12. This is a sufficient indication of the Legislative intention, that the several statutes confering fees and allowing them to be taxed in the bill of costs must be strictly construed.

The act of 1812 allows to counsellors and attorneys at law, for prosecuting or defending a suit in chancery, the sum of fifteen dollars, which, by the act of 1815, is to be recovered by the party prevailing in the suit, against the party cast.—Clay's Dig. 236-7. The statute no where speaks of two or more tax fees being recovered in the same suit, however numerous the parties, or however distinct their interests may be. We do not feel authorised to extend the operation of this statute, by giving it the equitable and liberal construction contended for, but on the contrary, must construe it strictly, and thus construed, we feel no hesitation in saying that but one tax fee can be allowed in each suit to be paid by the unsuccessful party, where defence has been made by him or them.—Clay's Dig. 334. Let the decree of the chancellor, disallowing more than one tax fee in the same suit, be affirmed.

PHEREBY, A SLAVE, *vs.* THE STATE.

1. In the criminal prosecution of a slave for murder, the indictment must allege who the owner is at the time it is found, and the allegation must be supported by the proof.

Error to the Circuit Court of Fayette. Tried before the Hon. Geo. Goldthwaite.

THE plaintiff in error was indicted for the murder of Elizabeth Sheppard, and was described in the indictment as her property. On the trial, the State proved that the plaintiff was the property of said Elizabeth Sheppard at the time of her death, but made no proof of property in any person since.—The prisoner's counsel requested the court to charge the jury, "that unless a property in the prisoner, at the time of the finding of the indictment, was proved, the jury must acquit the prisoner," which charge the court refused to give, but charged "that if a property in the prisoner, at the time of the alleged murder, was proved, it was sufficient." To the charge given, and refusal to charge as asked, the prisoner excepted, and now assigns them as error.

ORMOND, for the plaintiff in error.

J. L. MARTIN, for the State.

DARGAN, C. J.—The case of Flora v. The State, 4 Port. 111, is precisely in point, and compels us to reverse the judgment of the Circuit Court, unless we overrule the decision in that case. A majority of the court, however, think that we should be governed by the authority of that case, and I am therefore instructed to reverse the judgment of the Circuit Court. My own opinion, however, is that the judgment should be affirmed. All that need be alleged in an indictment against a slave, is the crime with which he is charged and his *status* or condition. I do not think it necessary that the indictment should show who is the owner of the slave, even where the owner is known, and, therefore, no proof of ownership is necessary; but as a different rule of construction has been applied to our statute, regulating the trial of slaves for capital offences, the majority of the court are of the opinion that we should not depart from that construction.

The judgment of the Circuit Court must therefore be reversed and the cause remanded for further proceedings. The prisoner, however, will be retained in custody to abide another trial, unless she be discharged in the meantime by due course of law.

NORRIS *vs.* THE STATE.

1. Where insanity is set up as a defence to a criminal prosecution, it is competent for a witness, whose intimacy with the prisoner and opportunies for observation have been such as to enable him to form a correct judgment of his mental condition, not only to depose to facts, but to give his opinion as to whether he was sane or not at the time of the commission of the offence.

Error to the Circuit Court of Montgomery. Tried before the Hon. Sam'l Chapman.

ELMORE, for plaintiff in error.

ATTORNEY GENERAL, for the State:

1. On questions of science, trade, &c., persons of skill, as a general rule, alone may give their opinions in evidence. 1 Greenl. Ev. § 440.

2. An exception to this general rule is, that in cases of insanity, any persons occupying a peculiar relation or connection to the person whose soundness of mind is questioned may "detail facts, circumstances and a series of declarations, conducing to show an aberration of mind," and give their opinion on the same. Bowling v. Bowling, ex'r, 8 Ala. Rep. 538; Robert v. Trawick, 13 Ala. Rep. 84; Watson v. Anderson, ib. 204; Gibson v. Gibson, 9 Yerg. 332.

3. This exception is applicable only to will cases, and does not apply to all civil cases, and is permissible in cases of wills more on authority than sound reason. McCurry v. Hooper, 12 Ala. Rep. 823.

4. Even if the exception were good in *all* civil suits, there would be no reason why the same rule should prevail in criminal cases, which, in order to absolve the party from guilt, require a *higher degree of insanity* to be shown than would be sufficient to discharge one from the obligations of his contract. 2 Greenl. Ev. § 372.

5. The exception to the general rule referred to should never prevail in criminal cases, where, when guilt is once proven and the prisoner relies on insanity as a defence, he must make it out to the satisfaction of a jury, beyond all reasonable doubt.

And aside from the different conclusions that witnesses, not experts, &c., would arrive at from the same facts, tending only to mislead and embarrass the jury, a *strong and irresistible* desire to shield a near relative from an ignominous death would be too great a temptation, in many instances, to commit perjury.—State v. Brinyea, 5 Ala. Rep. 243.

6. One reason why the exception prevails in will cases may be found in the fact, that those upon whom the temptation to commit perjury might act have their mouths sealed by being interested witnesses on one side or the other.

7. There is no error affirmatively shown in the bill of exceptions.

8. To permit any and every witness who can detail acts, &c. to give an opinion upon those acts, that the party is sane or insane, would be to confer upon such witnesses the functions of the jury.

CHILTON, J.—This was an indictment for grand larceny. Plea not guilty. The defendant below was convicted and sentenced by the presiding judge to three years imprisonment in the penitentiary.

A bill of exceptions was sealed at the trial, from which it appears that the father of the prisoner was introduced as a witness, who testified that his son was about seventeen years of age at the time of the commission of the alleged act: That he had lived with him from his infancy (birth,) and he testified to many facts, consisting of the acts and declarations of the prisoner, tending to show, that for a series of years he had been insane, and was of unsound and diseased mind at the time of the commission of the supposed larceny. Upon the part of the defence, it was then proposed to prove by the witness, that it was his opinion, founded on the acts and declarations thus deposed to, that the prisoner was of unsound mind at the time of the alleged offence, but the court refused to permit the witness to give his opinion as evidence to the jury. The witness then stated that he knew of numerous little acts and circumstances, which he had not the power to detail or explain, but which would go to show the condition of the defendant's mind for a series of years, up to the time he committed the alleged act, and which aided witness in the formation

of his opinion as to the mental condition of the prisoner. The proposition to admit his opinion was thereupon renewed, but rejected by the court. One Haman was also introduced in behalf of the prisoner, who swore that he had been teaching school since 1841; that the defendant was his pupil in 1847, and so continued up to within a short period of the alleged act: That the conduct of the prisoner had attracted his peculiar attention ever since he had become his pupil: That he had been in the habit of closely observing the peculiar mental characteristics of his pupils, and of noticing their ability to comprehend and to learn; that he had particularly observed the mental condition of the prisoner, and felt capable from this, as well as from his general observation of the minds of all his scholars, of giving a correct opinion as to the character and condition of the defendant's mind up to the time he left his school. The defence then proposed to prove by this witness, that in his opinion, the prisoner was insane and incapable of distinguishing between right and wrong. This proof was also rejected by the presiding judge, and the several decisions of the primary court, rejecting the opinions of said witnesses, are now insisted on in this court as erroneous.

Although as a general rule, the opinions of witnesses are not to be received as evidence, yet there are exceptions to the rule, arising either out of the nature of the fact to be proved, or dependent upon the character of the witness by whom the proof is to be made. Of the first class, we may instance the familiar practice of receiving as evidence a witness's belief or opinion of the identity of a person; his hand writing; of the value of property, and the like. So of the second, *experts* or persons skilled in the science, profession or trade, to which the question has relation, may give their opinion in evidence. The opinions of medical men as to the cause of disease—the tendency of wounds, as well as the mental condition, are constantly received.—1 Greenl. Ev. § 440. But upon the question of sanity or insanity, the exception seems to extend beyond the opinion of medical men, and to allow the opinion of such witnesses, as from long intimacy, or familiar and frequent intercourse with the party alleged to be insane, peculiarly fit them to judge of his mental condition. Such opinion, however, must be preceded by the facts and circumstances

upon which it is predicated.—Boling v. Boling, ex'r, 8 Ala. Rep. 538; State v. Brinyea, 5 ib. 243; Roberts v. Traywick, 13 ib. 84; Clarke v. The State, 12 Ohio Rep. 483; Clary v. Clary, 2 Iredell's Rep. 78. In the case last cited, it is well observed "if the witness may be permitted to state he has known the individual for many years, has repeatedly conversed with him and heard others converse with him, and had noticed that in these conversations he was incoherent and silly; that in his habits, he was occasionally highly pleased and greatly vexed, without a cause; and that in his conduct he was irrational, extravagant and crazy; what would this be but to declare the opinion of the witness of what is incoherent or foolish in conversation, what reasonable cause of pleasure or resentment—and what the *indicia* of sound or disordered intellect? The court in that case held, that a witness who has had an opportunity of knowing and observing a person whose sanity is impeached, may not only depose to the facts he knows, but may also give his opinion or belief of his sanity or insanity. Such evidence seems generally to have been admitted in the Ecclesiastical Courts of England.—See Wheeler v. Alderson, 3 Hogg's Ecc. Rep. 574; 1 Greenl. Ev. 3d ed. 595, n. 6, and authorities cited; Phil. Ev. C. & H. notes, 759 n. 529. A person may be insane—he may carry along with him such marked and unmistakable indications of a diseased intellect, as to satisfy every one familiar with his habits and peculiarities that he is insane, yet perhaps but few persons, without giving an opinion, could so describe the pathological condition of his mind, as to communicate to a jury a distinct idea of his true condition. Shall the witness be confined to facts alone? Does not even a casual observer of mental phenomena fully recognize the impossibility of communicating to another the facts, and almost numberless minute circumstances, indicating a morbid action of the brain, and consequent mental aberration, the main force of which may consist in some peculiar characteristic, which none but the observer can fully appreciate? The jury, unlike the witnesses, have no knowledge of the condition of the accused from personal observation. How then shall they be placed in possession of those mysterious and indescribable phases which insanity wears, which, though they make a correct and vivid

impression upon the mind of the observer, yet lose much of their force by an attempted description? Must the prisoner lose the benefit of such testimony altogether, or shall the witness be required to furnish as well as he may, a pantomimic delineation of the wild look, the vacant stare, the unnatural gait, the distorted countenance, the idiotic laugh, as well as the numberless caprices and sudden and apparently causeless exhibitions of joy and sorrow? Were such the law, the force of the testimony would be made to depend upon the powers of the witness for imitation. Besides, the whole would resolve itself into matters of opinion at last, since the witness would but exhibit, as well as he could, the *conception or opinion*, formed in his own mind, of the appearance and conduct of the prisoner. "But judgment," says Judge Gaston, in the case of Clary v. Clary, *supra*, "founded on actual observation of the capacity, disposition, temper, character, peculiarities of habits, form, features, or hand writing of others, is more than mere opinion. It approaches to knowledge, and is *knowledge* so far as the imperfection of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observation of others."

In the case before us, the witnesses whose opinions were offered, although not physicians, were nevertheless well qualified, from their long intimacy with the prisoner, and peculiar opportunities of observing his mental aberrations, to form a correct judgment concerning his true condition. Certainly no one than a parent has a better opportunity of knowing the mental condition of a child upon whom Providence has laid an afflicting hand; and next to the parent, the person to whom such child may be turned over for instruction. We feel satisfied, both from reason and authority, the proof should have been received.

We do not agree with the attorney general that such opinions are confined to cases arising under contested wills, or in civil controversies. We see no reason and find no authority thus limiting the exception. Neither does the fact that a father may be induced to commit perjury to save life of the son,

in giving an incorrect opinion as to his sanity, render the proof illegal. The fact of relationship goes to the credit, not to the competency of the witness, and although some may be found base enough to yield to such temptation, and the guilty thereby escape, there will doubtless be cases where the unfortunate victim of disease or grief, whose derangement of mind deprives him of free agency, will be rescued from the gallows or penitentiary, so that he may share the benefit of some provision to be made for his restoration.

Our conclusion is that the opinions of the witnesses offered under the circumstances, should have been allowed to go to the jury for what they were worth, that the jury having scanned them might have determined whether the party was really insane when he committed the alleged offence, or whether his insanity was simulated.

Let the judgment be reversed, and the cause remanded.

COBIA *vs.* THE STATE.

1. The crime of murder being divided by our penal code into two grades, with different punishments, it is necessary on the trial of an indictment for that offence, that the verdict of the jury should ascertain the degree, otherwise no judgment can be pronounced upon it.
2. Where the judgment of conviction on an indictment for murder is reversed, because of the insufficiency of the verdict to support it, the prisoner may be tried again, without violating the 13th section of the 1st article of the constitution.

Error to the Circuit Court of Barbour. Tried before the Hon. Sam'l Chapman.

RICE, for the plaintiff in error.

ATTORNEY GENERAL, for the State.

DARGAN, C. J.—Francis J. Cobia was indicted in the Circuit Court of Barbour for the murder of John, a slave, the property of Alexander P. Crawford. The jury returned a verdict of "Guilty in manner and form as charged in the indict-

ment." On this verdict the court pronounced sentence, that the prisoner be imprisoned in the penitentiary for the term of ten years. A writ of error in conformity with the statute has been sued out by the prisoner, who here assigns for error that the verdict of the jury is insufficient to warrant the sentence pronounced by the court.

The indictment is framed in strict conformity with the rules of the common law, and the verdict responds simply to the indictment, that the accused is guilty in manner and form as charged. The question therefore is, whether the law as modified by our statutes will warrant the sentence or judgment pronounced by the court. By our penal code, murder is divided into two grades—murder in the first and second degrees. Murder in the first degree is punished with death or confinement in the penitentiary for life. Murder in the second degree is punished by confinement in the penitentiary for a period not less than ten years. It is also made the duty of the jury before whom any one indicted for murder shall be tried, if they find the offender guilty, to ascertain by their verdict whether he be guilty of murder in the first or second degree; or if the accused shall confess his guilt, the court shall proceed by impannelling a jury and the examination of the witnesses to determine the degree of the crime and to give sentence accordingly.—Clay's Dig. 412-13, §§ 1, 2.

We think it very clear that the verdict of the jury does not warrant the sentence pronounced by the court. The verdict finds the accused guilty in manner and form as charged in indictment. So if the defendant had pleaded guilty, or confessed his guilt, the record would only have shown that the prisoner was guilty of murder as charged, but in what degree would have been left uncertain. In the latter case, however, the court could not have pronounced judgment, but it would have been necessary to impannel a jury to ascertain whether he was guilty of murder in the first or second degree, before sentence could have been pronounced against the prisoner. If the court cannot pronounce sentence against the prisoner on his plea of guilty as charged in the indictment, we do not see how sentence can be pronounced on a verdict of guilty as charged. The verdict only finds the facts charged to be true; the confession of guilt would equally ascertain the same facts

to be true; but whether the accused was guilty in the first or second degree would be left equally uncertain, whether he was found guilty by a jury, or confessed his guilt at the bar of the court. In either case, before the court can pronounce judgment, it must be ascertained by the verdict of a jury whether he be guilty in the first or second degree.

In Tennessee, there are two degrees in the crime of murder, and a different punishment affixed to each degree. The Supreme Court of that State has held that upon an indictment for murder, without specifying the degree intended to be charged, the jury must ascertain by their verdict the degree of the prisoner's guilt, and if they do not, sentence cannot be pronounced on the verdict.—McPherson v. The State, 9 Yerg. 279; Kirby v. The State, 7 Yerg. 259. So in the case of Thomas v. The State, 5 How. (Miss.) Rep., it was decided that where the punishment is graduated by the degree of the crime, the verdict must ascertain the degree of the offence, or no judgment can be rendered. So if an indictment contain two distinct charges of different offences punishable differently, and the verdict be guilty generally, without specifying of which particular charge, no judgment can be rendered.—State v. Montague, 2 McCord, 257. These authorities, in our opinion, are in conformity with the general principle that the record of conviction should point out with precision the sentence or judgment the court should pronounce. If the indictment and verdict leave it uncertain what judgment or sentence should be rendered against the accused, the court can pronounce none. It has however been urged, with much plausibility, that the accused cannot complain of the judgment in this case, inasmuch as the sentence pronounced was the lowest degree of punishment that the law affixes to murder in the second degree. The answer, however, to this argument, is that the statute peremptorily requires that the degree be ascertained by the verdict of the jury, and if this be not done, the court has no power to render judgment at all. The judge without the intervention of a jury cannot ascertain the degree of guilt, and this must be done before the judgment can be rendered. As the judgment must be reversed on this ground, it becomes unnecessary to examine the questions growing out of the bill of exceptions.

The only remaining question is, whether the prisoner shall be discharged, or whether he shall be tried again. It is contended that he should be discharged, because he was regularly put upon his trial upon a sufficient indictment, and the evidence in support of the charge submitted to the jury; and that he was therefore in jeopardy within the meaning of the thirteenth section of the first article of our constitution. We do not deem it necessary to enquire at what point of time jeopardy may be said to commence, when it ends, or under what circumstances it may be said to exist; for we are unanimous in the opinion that if one has been convicted of a felony, and the judgment has been reversed at his instance, or a new trial granted on his motion, he may be tried again. Judge Story in his Commentaries on the Constitution says that the meaning of this clause is, that the party shall not be tried a second time for the same offence, after he has been once convicted or acquitted by the verdict of a jury; but that it does not mean that he may not be tried again, if the jury has been discharged without rendering a verdict, or if, having given a verdict, the judgment is arrested or a new trial granted in his favor.—Vol. 3, § 1781. See also Rawle on the Constitution, 132-33. The discharge of the jury here spoken of must be understood to mean a legal discharge, for all the authorities agree in this, that if the prisoner be put on his trial upon a sufficient indictment, and the evidence in support of the charge is submitted to the jury, the court cannot arbitrarily interfere and arrest the trial by discharging the jury, and if the court should discharge the jury before they deliver their verdict, without a sufficient legal reason for doing it, the prisoner shall never be tried again.—Ned v. The State, 7 Port. 213. If, however, the prisoner shall consent to the discharge of the jury, whether there was good reason for discharging them or not, nevertheless he can take no advantage of it, for then it cannot be said that he has been deprived of the right to be tried by that jury, for he has consented to it. In the case of Hughes v. The State, 2 Ala. Rep. 102, the prisoner was indicted and convicted of murder. The judgment, however, was reversed by this court, and the question arose whether he could be tried again. It was decided that he could, and the cause was remanded for that purpose. This decision is in conformity with the decisions of

most of the States of the Union. See The People v. Goodwin, 18 Johns. 187; The People v. Perkins, 1 Wend. 91; McPherson v. The State, 9 Yerg. 279; Gibson v. The Commonwealth, 2 Virginia Cases, 111; Bird v. The State, 1 Howard. After a deliberate examination, we must express our entire approbation of the principle recognised in the case of The State v. Hughes, and we therefore hold that the prisoner may be tried again.

The judgment must be reversed, and the cause remanded, that the prisoner may be again tried, unless in the meantime he be discharged by due course of law.

MUNROE *vs.* PRITCHETT.

1. In an action on the case by the vendee against the vendor of land, to recover damages for falsely representing that the tract embraced a certain designated portion of good land, whereby the vendee was induced to make the purchase, it is not necessary to prove that the vendor knew that the representation was false at the time he made it.

Error to the Circuit Court of Talladega. Tried before the Hon. Thos. A. Walker.

RICE & MORGAN, for plaintiff.

WHITE & PARSONS, for defendant:

An action for deceit in a sale can only be sustained when an affirmation wilfully false, or some artifice is proved, or is to be presumed from the circumstances attending the transaction.—Emerson v. Brigham, 10 Mass. 197; Parkinson v. Lee, 2 East, 320; ib. 426. And an affirmance that a thing is so, without a knowledge on the part of him making it that it was not so, and without warranty, is not actionable—Chandler v. Lopus, 2 Croke 4; Law Lib. vol. 19, 62, and cases cited.

It is a principle of the common law that fraud without damage, or damage without fraud, gives no cause of action, but when these two concur, then action will lie—Sherwood v. Salmon, 5 Day, 439.

It does not appear what *knowledge* the plaintiff had, or that he acted upon the representations of the defendant in regard to the location, nor does it appear on the other hand that the defendant knew the location of the land. As to materiality of these facts, see Sandford v. Handy, 23 Wend. 260; S. India Rubber Co. v. Adams, 23 Pick. 265; Pickering v. Dowson, 11 Taunton, 775; 2 Bibb, 602. Upon the first point and the principal one in the cause, the court is refered to Comyn's Digest, vol. 1, 350, Action upon the case for a deceit (A. 8); Williamson v. Allison, 2 East, 446; Meyer v. Ererth, 4 Camp. 21; Suxas v. Woods, 2 Caines, 48; Cozzins v. Whitaker, 3 Stew. & Porter, 322; Prior v. McNairy, 1 S. 150; Burnett v. Stanton & Pollard, 2 Ala. 181.

CHILTON, J.—This was a special action on the case, brought by the plaintiff in error against the defendant, to recover for the injurious consequences of a false and fraudulent representation, made by the defendant to the plaintiff upon the sale of a tract of land. The declaration, or affirmation was, that a certain line of the tract proposed to be sold by the defendant to the plaintiff would embrace within it a certain quantity of good land, which was pointed out, *ubi revera*, it was not included in the tract, and the defendant at the time knew it; but on the contrary, the quantity was made up of sterile land of but little or no value. Plea, not guilty, and judgment upon the verdict for the defendant.

It appears by a bill of exceptions sealed at the trial, that the plaintiff having introduced proof tending to show that the allegations of his declaration were true, and the proof conflicting, as to whether the defendant, at the time he made the representations complained of, knew that they were false, the plaintiff asked the court to charge the jury, "that if they believed the evidence, and that the defendant had misrepresented the eastern line of said tract, and that said plaintiff had thereby been induced to make the purchase of the same, and had been injured by such misrepresentation, it was not incumbent on the plaintiff to prove that the defendant knew the falsity of his representation as to said eastern line when he made it." The court refused this charge, and in lieu thereof, instructed the jury, that although such representation had been

made, and was false, and the plaintiff thereby injured, yet unless he knew it was false at the time he made it, the plaintiff could not recover in this action.

The question presented by the above charge is, whether in an action on the case to recover damages for the injurious consequences of a false representation made by the vendor at the time of the sale, in a matter constituting a material inducement to the trade, it is necessary for the plaintiff to prove that the defendant knew the affirmation was false at the time he made the same.

The counsel for the defendant insists, that to sustain this action, the plaintiff must show something beyond the bare falsity of the affirmation upon which he may have acted in making the contract of purchase; that he should show the representation was knowingly false, or that some artifice, going to establish fraud or deception, was resorted to in order to effect the sale. In Morgan v. Patrick & Smith, 7 Ala. Rep. 187, it is said "wherever there is a deceit coupled with an injury, an action on the case will lie, (citing Pasley v. Freeman, 3 T. Rep. 31) and even where a warranty under seal was executed, it has been held by this court that an action may notwithstanding he maintained, upon the deceit—Cozzins v. Whitaker, 3 S. & P. 332." The court further say: "it is true, this was a case where the warranty and deceit were with respect to personal property; but the same rule is laid down as applicable to purchases of land—citing Cooper v. McLewry, Cooper, 308; 3 Coke on Litt. note, 381, a.; and is recognized in Cullum v. Br. Bank at Mobile, 4 Ala. Rep. 16." The same doctrine, as applicable to real estate, was held in Gordon v. Phillips, 13 Ala. Rep. 565—see also 13 Johns. Rep. 325; 2 Caines Rep. 193; 1 Day's Rep. 250. Mr. Saunders in the second vol. of his work on Pleadings and Evidence 527, says, "that in an action for falsely representing a third person fit to be trusted, a *scienter* must be alleged and proved; though indeed the word "fraudulently" might be a sufficient allegation in this respect, especially after verdict: Willes, 584. But in an action on the case for fraud, or misrepresentation of any kind, an express warranty or *scienter* need not be alleged, nor proved, if alleged." Mr. Chitty says that case or assumpsit may be supported on a false warranty for the sale of goods, but

recommends that assumpsit be brought in cases of breach of express or implied contracts of warranty, in order that a count for money had and received may be inserted in the declaration, so as to recover back the consideration paid. 1 Chitty's Pl. 137. "Case" says he "is necessarily the form of action for deceitfully representing a person as fit to be trusted, or other deceit, independently of and without relation to any contract between the parties, and for fraudulent representations, not introduced into a written contract between the parties, respecting the subject matter of the representations, case is the proper remedy, if any. In an action upon the case in *tort* for a breach of a warranty of goods, the *scienter* need not be laid in the declaration, nor if charged need it be proved," ib. In Bacon's Ab. tit. Act. on the Case E, it is said if there be a communication between A and B for the buying of certain sheep, and B, the vendor, says they are his own sheep, when in truth they are the sheep of another; whereupon A buys them of B, though B made not any express warranty of the sheep, yet an action upon the case in the nature of deceit lies against him. So also, where the vendor affirms that the goods belong to a stranger, his friend, and that he has authority to sell the same, in consequence of which B buys them, when in truth they are the goods of another; yet if he sold them fraudulently and falsely upon this pretence of authority, though he did not warrant them, and though it is not avered that he sold them, knowing them to be the goods of a stranger, yet B shall have an action upon the case for this deceit—1 Bacon's Ab. (by Bouvier) 112, citing Rolle's Ab. 91. Mr. Chitty, who acknowledges the extreme difficulty of laying down any general principle or elementary doctrine upon this subject, says that "fraud more clearly occurs where one person substantially misrepresents or conceals a material fact peculiarly within his own knowledge, in consequence of which a delusion exists, &c." but concedes that fraud in such cases depends upon the peculiar facts which have occurred, the relative situation of the parties and their means of information.—Chitty on Con. 223–4. In Adams v. Jarvis, 4 Bing. 66, Best, C. J., says "If a man buys the goods of another, from a person who has no authority to sell them, he is a wrong doer to the person whose goods he

takes, yet he may recover compensation against the person who sold the goods to him, although the person who sold them did not know that he had no right to sell; this is proved by Medina v. Stoughton 1 Salk. 210; Saunders v. Powell, 1 Lev. 129; Grasse v. Gardner, Carth. 90; 1 Rolle's Ab. 91, and many other cases. These cases rest on this principle, that if a man having the possession of property which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when in point of fact the affirmant is not the owner, he is liable to an action. It has been said that this is because there is a breach of contract to rest the action on, and that there is no contract in this case. This is not the true principle—it is this: *He who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is, both in morality and law, guilty of falsehood, and must answer in damages.*" The concluding remark in the foregoing extract, which is italicised, we think is a very just and correct exposition of the rule of law. Nothing is more common than for courts of equity to set aside contracts for material misrepresentations, upon which the purchaser has relied to his detriment, and on which he had a right to repose, even though such misrepresentations were made through mistake, inadvertence, or ignorance. They are considered as constructively fraudulent, because their effect has been to impose upon and deceive the purchaser.—Story on Con. 107, and the numerous authorities collated in note 3. To constitute such misrepresentation a ground of fraud for avoiding the contract, or to entitle the injured party to his action, it must be, as we have said, in regard to a material fact, operating as an inducement to the purchase, and upon which the purchaser had a clear right to rely, and the party complaining must have actually been deceived thereby; and generally, such representation must not be mere matter of opinion, or in respect of facts equally open to the observation of both parties, and concerning which the purchaser, had he exercised ordinary prudence, could have attained correct knowledge. If the purchaser blindly trusts, where he should not, and closes his eyes where ordinary diligence requires him to see, he is willingly deceived, and the maxim applies, "*volunti non fit injuria.*"

There are several decisions of our own court bearing upon

the point under consideration.—See Rix v. Dillahunty, 8 Port. Rep. 133; Bennett v. Staunton & Pollard, 2 Ala. Rep. 181; Williams v. Cannon, 9 ib. 348; Juzan et al. v. Toulmin, ib. 662-684. In the case last cited, it is said, "That whether a party misrepresenting a fact knew it to be false, or made the assertion without any precise knowledge on the subject, is immaterial; for the affirmation of what one does not know or believe to be true is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false." See also Camp v. Camp, 2 Ala. Rep. 722–636; Young v. Harris, adm'r, ib. 108; Mahone v. Reeves, 11 Ala. Rep. 345.—From our own decisions, I think the conclusion may be deduced, that although in an action on the case to recover for the consequences resulting from a fraudulent misrepresentation of matter of fact, coming within the restrictions above laid down, the plaintiff must show that such misrepresentations were fraudulently made, yet it is not indispensable that the party making them should at the time *have known* them to be false. It is sufficient that he made them recklessly, not knowing them to be true, and for the purpose of influencing the other party in making the purchase. The seller, who owns the land, and who proposes selling it, must be presumed to know more about the lines and what land is embraced within the tract than the buyer. In this case, whether he did or did not, he assumed to know the fact that certain good land, which formed an inducement to the purchase, was included, and he asserted this *as a fact*, upon which the purchaser relied and might well rely in concluding the bargain. He thus induces the purchase, upon his false statement of matter of fact, and pockets the gains. Shall he, when sued, say, "I did not *know* that I was telling an untruth"? It is sufficient that he misrepresented the fact, and *did not care* that he did so,—in other words, that he asserted as true, and as matter of knowledge, that which was untrue, and which he either knew nothing about or knew to be untrue. Did the law allow the action to punish the untruth, and not as a compensation to the party injured by its consequences, then it would be proper to make the action depend upon the *scienter;* but the action is for the injury sustained by reason of the reckless, false assertion of the vendor, which was calculated to deceive and did de-

ceive the purchaser—consequences which to him are precisely the same, whether the vendor knew or did not know, or care to know, that the assertion was false.

This view, we think, is fairly deducible from numerous adjudicated cases, harmonizes with reason and sound morality, and requires nothing on the part of the vendor but fair and open dealing. True, it is opposed to the case of Chandler v. Lopus, 2 Cro. Jac. 4, and some other of the earlier English authorities, but this case of Chandler has not generally been followed either in this country or in England. Indeed it is expressly denied as authority in Bradford v. Manly, 13 Mass. Rep. 143, and in the very learned opinion of Dorsey, J. in Osgood v. Lewis, 2 Har. & Gill, 495, which last opinion fully sustains the view we have taken.

Our conclusion is, that the charge which the court gave was clearly incorrect, as this made the right to recover dependent on the knowledge of the vendor that his affirmation was untrue.

It is unnecessary to examine the other points raised in the bill of exceptions, as they will not probably arise upon another trial.

Judgment reversed and cause remanded.

SPRUIL *vs.* COOPER.

1. Although in an action of slander for charging the plaintiff with perjury, it is necessary for the defendant, if he pleads justification, to support his plea with such proof as would be required to convict the plaintiff on an indictment for that offence, yet it is not necessary, as in a criminal prosecution, that it should be of that degree of certainty requisite to remove all reasonable doubt from the minds of the jury.—A mere preponderance is sufficient.

Error to the Circuit Court of Marion. Tried before the Hon. Geo. Goldthwaite.

This was an action of slander by the defendant against the plaintiff in error, for charging him with the offence of per-

jury. Plea of justification. The proof tended to sustain the plea. The court charged the jury that they should be convinced of the truth of the facts which are necessary to sustain the plea beyond a reasonable doubt, and that a predominance of evidence in favor of said plea, unless it so convinced their minds, would not authorise a finding in its favor. To this charge the defendant excepted, and now assigns it as error.

Earnest, for the plaintiff in error.

No counsel for the defendant.

DARGAN, C. J.—In an action of slander for charging the plaintiff with perjury, if the defendant plead the truth of the charge in bar of the action, he must introduce such proof in support of his plea as would be required to conviet the plaintiff on an indictment for that offence. Wooddeck v. Keller, 6 Cow. 118; 16 Wend. 601; 7 Blackf. 83. The extent of this rule, however, is that the defendant must sustain his plea by two witnesses, at the least, or by one witness and corroborating circumstances. When this is done, the jury are then to weigh the evidence in support of the plea, as they would in any other civil suit. If the testimony preponderates in favor of the plea of justification, they may find in favor of the defendant, although upon the same evidence they might acquit the plaintiff were he on his trial for perjury, by allowing him the benefit of a reasonable doubt. We do not understand that in civil suits it is necessary for the plaintiff to prove his cause of action, or the defendant to prove his defence with that degree of certainty as to remove all doubt from the minds of the jurors, but they may give their verdict according to the weight or preponderance of the testimony, notwithstanding it may not be sufficient to exclude all doubt from their minds. This is the conclusion we attained in the case of Hopper v. Ashly, 15 Ala. Rep. 457, and we think that case is well sustained by reason and authority. It is true, that in prosecutions for felonies, the accused is entitled to the benefit of all reasonable doubt, and if the testimony does not exclude all reasonable doubt, he should be acquitted. This rule, however, should be confined to criminal prosecutions and cannot with propriety be applied to civil suits, neither in favor of a plaintiff or defen-

dant. The rule that prevails in courts of equity is, that the answer of a defendant, being under oath, must be disproved by two witnesses or by one witness with corroborating circumstances, in order to entitle the complainant to a decree. Yet it never has been contended that this proof must be of such a conclusive character as to relieve the mind from all doubt—it is sufficient if it satisfy the mind of the chancellor of the truth of the allegations of the bill. So in the case at bar, if the plea was sustained by two witnesses, or by one witness and corroborating circumstances, and the proof was sufficient to induce the jury to believe the plea was true, they should have found a verdict in favor of the defendant, although the proof might not have been of such a conclusive character as to relieve the mind from all doubt. The ruling of the Circuit Court was, that the testimony should exclude all reasonable doubt from the minds of the jury before they could find in favor of the defendant. In this the court erred, and the judgment must be reversed and the cause remanded.

ANSLEY & WIFE *vs.* ROBINSON & WIFE ET ALS.

1. A decree is final which settles the rights of the parties, notwithstanding a reference is ordered; and such decree cannot be altered or amended, except in matter of form or clerical misprision, unless it be done by consent, or upon a re-hearing granted, or on bill of review, or bill in the nature of a bill of review.
2. Courts of equity in this State are courts of record, and decrees, like judgments at law, are considered matters of record, and deemed enrolled as of the term when rendered.
3. A decree cannot embrace matters not charged in the bill, although warranted by the proof, or the admissions of the defendant.

Error to the Chancery Court of Montgomery. Tried before the Hon. Jos. W. Lesesne, chancellor.

SEABORN WILLIAMS, for the plaintiffs in error.

T. & J. D. F. WILLIAMS, for defendants.

CHILTON, J.—This bill was filed by five out of six legatees under the will of Jeremiah Smith deceased, to have a division of the estate of said deceased made among them, according to the provisions of the will of said testator. The will is exhibited with the bill, from which it appears that the testator directed that all of his estate should be kept together on the plantation on which he then lived, until his youngest child, Burwell Smith, should arrive at the age of twenty-one years, and then the same was to be equally divided among all his children. It is avered that said Burwell has attained his majority, and that the estate is in the hands of O. P. King, one of the complainants, who is the present administrator with the will annexed: It is further stated that all the said children are desirous that partition should be made of the estate. William Ansley and his wife Zerena, late Zerena Smith, are made the sole defendants. The prayer of the bill is, that partition be made of the lands and slaves of the estate, and that the portions due the married daughters of said testator, Mrs. Ansley included, may be settled to their respective sole and separate use and to such child or children as they may leave at the time of their death, free from the debts, &c. of their husbands, &c.

Ansley and wife answer and admit the allegations of the bill and accept the relief thereby tendered. The late chancellor (Crenshaw) granted the prayer of the bill, decreeing to the daughters separate estates in the property which would fall to their share upon a division, and appointing commissioners to make partition of the slaves and of the real estate, if as to the latter it could be advantageously done, but if not, that the commissioners report the fact, and what disposition should be made of it, &c. The commissioners appointed to divide the property made partition of the slaves, but reported that the land could not be advantageously divided, and recommended its sale. No objection was made by any of the parties to this report, but by consent it was agreed as there was a bill pending in regard to the title to the land, that no action of the court should be had with respect to that at that term

The decree of the present chancellor, after the coming in of the commissioner's report, vests the slaves so severally allotted to each of the children, in them, according to the previous de-

cree, except the shares allotted to Boling Smith and Mrs. Ansley. As to them, the decree recites "that it was stated and admitted that Boling Smith, one of the complainants, has acted as one of the executors of Jeremiah Smith, and that William Ansley has also acted as one of the executors of said estate, and that their accounts as such executors have not yet been settled, and it is insisted by the other legatees that on such accounting the said Boling Smith and William Ansley will be found largely indebted, and in arears with said estate, and they claim that the portions of said estate, to which said Boling Smith and William Ansley may be entitled, shall be held by the said O. P. King, the personal representative of the said estate, until the respective accounts of the said William Ansley and Boling Smith shall be settled up." Thereupon the chancellor decreed that the slaves so allotted to Boling Smith, one of the complainants, and to Mrs. Ansley, should be retained by King, the administrator with the will annexed, until such time as should be fixed upon by the future order of the court. From this decree Ansley and wife have sued out their writ of error.

We think it manifest from the statement of this case, that the last decree of the chancellor cannot be sustained so far as respects the interest of Mrs. Ansley in the estate of her deceased father. In the first place, the former decree settles upon Mrs. Ansley, as well as the other legatees, the shares to which they shall be entitled after the partition, for which the decree provides, shall have been made. This decree fixes the rights of the respective parties—by it, they are each entitled to an equal share, the married women to hold theirs to their sole and separate use for life, and after their death, their shares to vest in their children. The rights of the parties then being fixed and finally ascertained by the decree, it only remained to confirm the report of the commissioners appointed to make partition, to vest in the legatees respectively the property severally allotted them by the commissioners. This report was made, and the last decree informs us was satisfactory to all the parties—no objection whatever was made to it in the court below, and none is insisted on in this court. The former decree thus disposing of the rights of the parties and ordering partition according to the prayer both of the bill and answer

of Ansley and wife, and also disposing of the question of cost, was final, and could not be altered or reversed but by the consent of the parties, or by a petition for a re-hearing according to the rules of practice, or upon a bill of review, or a bill in the nature of a bill of review. The decree is not the less final because the chancellor refers matters of fact necessary to an account to the master.—Bank of Mobile v. Hall, 6 Ala. Rep. 141. It was held, if a decree settles the rights of the parties, it is final, although there be a reference to the master to compute damages.—Weatherford, et al. v. James, 2 Ala. Rep. 170. See Kennedy's heirs, v. Kennedy's adm'rs, ib. 573; McKinley v. Irvine, 13 Ala. Rep. 681–693. According to the English practice, so long as the decree remained in the shape of minutes, that is, till it had been passed and signed by the register, it could be rectified by the court by petition or motion, or application to vary the minutes, but after a decree has regularly been passed and entered, the court will not alter or amend it, except by consent of all the parties, unless in respect of matters of form, or mere clerical misprisions. The party desirous of effecting other alterations must do so by applying to have the cause re-heard (Daniel's Ch. Pr. 1222–3,) or by bill of review, or bill in the nature of a bill of review, according as the decree has or has not been signed and enrolled, and as it is sought to have the cause re-tried as it was originally heard or accompanied with new matter.

With us, courts of equity are courts of record, and decrees like judgments at law, are considered matter of record, and deemed as enrolled as of the term of the court at which they were rendered (Story's Eq. Pl. § 403,) and this whether actually enrolled or not.

Whether the decree in the present case made by the chancellor at the February term 1846, could have been so modified or altered as to withhold from Mrs. Ansley the portion of the estate, to which under the will she was entitled, and which the decree vested in her for life, remainder to her children, had the party resorted to any of the modes recognized by the rules of practice for re-examining decrees, is not a question which it is necessary in the present aspect of the case to decide. Neither is it necessary to determine whether the portion so decreed could in any event be reached by the legatees

and held as indemnity by the administrator *de bonis non* with the will annexed against any supposed loss which they may be in danger of sustaining by reason of the indebtedness of William Ansley, or of his default as one of the executors of the estate. It is sufficient that none of the modes pointed out by law for altering the former final decree has been adopted, and for that reason, if for none other, the last decree ordering the administrator to retain the share of the slaves allotted by the commissioners to Mrs. Ansley is irregular.

But if the views above expressed were not correct, there is another, which it seems to me, puts the matter beyond doubt. We have said that the bill filed by all the legatees but one prayed for the very relief which the chancellor in the first decree awarded. This relief the sole remaining legatee also accepted by her and her husband's answer. There is not the first intimation given by the bill, or answer, or any other proceeding had in the cause, save the decree, that Ansley is debtor to the estate, or made default in delivering over to the present administrator all assets of the estate which came to his hands. The language of the bill is, "that they (the executors) took possession of the estate and managed the same for some time, and were afterwards removed by the Orphans' Court, and others appointed, to wit, R. K. Harrison, who acted as executor for some time; he resigned, when administration was finally granted to O. P. King, one of your orators, who is now the sole acting executor with the will annexed, *and has now the said estate in his hands.*" Such being the case, it matters not what admissions the parties might have made before the chancellor, as the effect of such admissions would only be to dispense with proof of the facts admitted, and could not warrant a decree not justified by the pleadings. It is well settled that a decree cannot embrace matters not charged in the bill, although it may be fully warranted by the proof.—Bozman, et al. v. Draughan, adm'r, 3 Stew. Rep. 243. Proof, without the proper averments in the bill, is as impotent to afford relief, as averments without proof when denied by the answer; and the rule is the same both at law and in equity, that the *allegata et probata* must correspond. In Clemens v. Kellogg, 1 Ala. Rep. 330, it was held, that no matter how just the demand which the complainant might make out by proof,

if it fails to harmonize with the allegations of his bill, he cannot recover.—See Morgan, ex'r, v. Crabb, 3 Porter's Rep. 470; Goodwin v. Lyon, 4 ib. 297; Duren v. Walker & Parsons, 5 ib. 345; Gibson, et al. v. Carson, 3 Ala. Rep. 421; McKinley v. Irvine, 13 ib. 681–686; Story's Eq. Pl. § 263–4, 254; 3 Lit. Rep. 339; 10 Wheat. Rep. 189; 10 Peters Rep. 178; Gres. Eq. Ev. 171. It results from what we have said that the admission of indebtedness on the part of Ansley is wholly without the cause, and any action of the chancellor as predicated upon it in withholding the share of Mrs. Ansley, so far from being sustained by the bill, is directly opposed to its prayer, and is therefore clearly erroneous.

The decree of the chancellor as it respects the portion of the property allotted by the commissioners to Mrs. Ansley must therefore be reversed; but as to all other matters, the same is affirmed, and this court proceeding to render such decree as the said Chancery Court should have rendered, does order and decree that the report of John Wood, Dent Lamar and Isaac C. Morgan, the commissioners appointed by said Chancery Court to make partition of said slaves and real estate belonging to the estate of Jeremiah Smith deceased, made to said Chancery Court, dated the 25th November 1846, be, and the same is hereby confirmed; and it is further ordered and decreed, that the negro slaves Ellick, Hannah, Cuffe, Jackson, Edmund, Agga and Grace, valued by said commissioners at the sum of twenty-seven hundred and seventy-five dollars, be, and the same are hereby vested in the said Zerena Ansley, wife of William Ansley, to her sole and separate use, for and during the term of her natural life, and after her death to her children, share and share alike, in no wise subject or liable to the debts, contracts or forfeitures of the said William Ansley, her husband. It is further decreed that the said Zerena Ansley pay into the hands of O. P. King, the administrator, for the use of Boling Smith, that the share allotted him may be equal to the share of said Zerena, the sum of fifty-eight dollars and thirty-three cents, and also that she refund to the said O. P. King, administrator as aforesaid, the sum of eight dollars and thirty-three cents, being the amount ordered to be paid by him by the previous decree, to the guardian of Thomas McD. King, thus equalizing the several shares of the

respective legatees as reported by the commissioners who made the partition. As, however, it does not appear that the husband of Mrs. Ansley is a proper person to receive the appointment of trustee to take charge of the said portion, the cause will be remanded to the Chancery Court, that upon the petition of the defendants, a trustee may be appointed to take charge of the estate in trust for Mrs. Ansley, according to the foregoing decree. In respect to the real estate, the cause will stand over for further directions as regards its sale.

Let the defendants in error pay the costs of this court.

STAPLER ET AL. *vs.* HURT'S EXECUTORS.

1. A court of equity acts *in personam*, and, when it has jurisdiction of the person, will afford relief against fraud, notwithstanding the property, in reference to which the fraud has been committed, is without the jurisdiction. In such cases, the relief will be adapted to its equity and justice, and if the fraudulent grantee refuses to return the property, he may be charged with its value.
2. When a reference is ordered to ascertain the amount of money due the complainant, or the value of property with which the defendant is charged by the decree, no execution should issue, until the report of the register comes in and is confirmed.
3. A creditor's bill, praying a writ of *ne exeat*, having been filed against S., as the fraudulent grantee of property, which he has removed from the State, he was arrested, and gave bond with security, conditioned to abide by and perform the final decree: *Held*—That it is error in the chancellor to order execution to issue against the securities for the value of the property, before they have had an opportunity to contest their liability on the bond.

Error to the Chancery Court of Russell. Before the Hon. W. W. Mason, chancellor.

THE bill in this case was filed by the testator of the defendants in error, and alleges that he recovered a judgment at the fall term 1841 of the Circuit Court of Russell against William D. Hargrove, one of the plaintiffs in error, on which execution had issued, and been returned no property; that Har-

grove, about the time the judgment was rendered, conveyed certain slaves, viz. March, William, Monday, Robin, George, and Gilbert, to William L. Stapler, without consideration and for the purpose of defrauding his creditors; that these slaves are still the property of Hargrove, who has enjoyed the profits arising from their labor and had some of them in his service ever since said fraudulent transfer, but that Stapler has removed them from this State to parts unknown, so that they cannot be reached by execution at law; and that Stapler himself is about to remove, and if he is permitted to do so, the debt of the complainant will be lost. The prayer of the bill is for a *ne exeat* against Stapler; that the conveyances from Hargrove to Stapler be set aside and delivered up to be cancelled; that Stapler be compelled to produce the slaves, or such of them as he has not sold, and be decreed to account for the value of those sold and the hire of those still in his possession. The bill having been verified by the complainant, a writ of *ne exeat* was granted, under which Stapler was arrested by the sheriff and gave bond, with security, conditioned to abide by and perform the final decree. Stapler and Hargrove both answered the bill, denying the allegations of fraud, but admitting the conveyance of the slaves by Hargrove to Stapler, and insisting that it was *bona fide* and on valuable consideration. Stapler states in his answer that he purchased the slaves to secure himself as a creditor of and as a security for Hargrove; that he is a resident of the State of Georgia, and has no intention of removing, and that all the slaves, except George whom he has sold, are in his possession in the State of Georgia.

Thomas P. Parke testified—that the slaves were in the possession of Hargrove in 1841, and in September of that year, March, Monday, Robin and George went into the possession of Stapler, and Gilbert and William into the possession of the witness, to secure them against liability on a bond for something over two thousand dollars, which they had executed for the benefit of Hargrove, and which bond was afterwards arranged by Hargrove and cancelled; that the slaves were all young and likely, one fourteen, another eighteen, and the others twenty-five years of age; that having a claim of $200 against Hargrove for money paid for him in removing an in-

cumbrance on said slaves, he proposed to Stapler to take possession of said slaves and pay him his demand, which he did; that Hargrove lived in Columbus, Ga. from some time in the year 1844 until the close of the year 1846, and Stapler resided in the house with him; that some two months after Hargrove removed back to Alabama, one of the slaves left Stapler's possession in Columbus and went to the residence of Hargrove; that Stapler followed him and wished to take him back, but Mrs. Hargrove objected and complained that Stapler had not before that time delivered up the slaves, when Stapler stated that he was ready at any time for a settlement with Hargrove and would relinquish the claim upon the negroes so soon as he had received what money he had paid out for him; and that a day for a settlement was then agreed upon, at which the witness was to be present, but at the appointed time Stapler did not attend. Attached to the deposition of this witness are two letters written to him by Stapler, in reference to the slaves March, Monday, Robin and George, one dated the 1st, the other the 4th Sept. 1841, the witness then being an inmate of Hargrove's house in Alabama. In the first, Stapler says—"I have a young man that I have all confidence in, &c., that will meet you at any point, say to-morrow night, at Fort Mitchell," &c. &c. "Silence is wisdom." In the second, he says, "On reflection I have thought you had as well cross the river at some point nearer town, as it will be as safe, for it will be at night, when not many is stirring, say, cross the Uchee at the first place below, after you leave, and come in by Mrs. Redd's and cross the river at McDougald's plantation. Mr. Kelly will know where to cross. If you think it will be better to cross at Fort Mitchell, proceed on there. You had better start the negroes from the house before it is night, and let them come a mile or two and wait until dark—tell them where they are coming, for fear they may not want to come." In a postscript to this letter, he adds, "When Hargrove comes home he must either come and see me or send them papers. I want those that come over here in one separate bill of sale, &c., and those that are over here in two dates—one in 1837, Oct. 6th, and the other in 1838, in March,—put them down at fair prices at that time, and don't put any children in them, and let him write them for fear they may detect it, and sign his

own name, and make them strong, and be particular about their ages at that time," &c.

Seaborn Jones testified—that he held three notes made by Hargrove with Stapler as security—one for $500, dated 7th Sept. 1841, and two for $1000 each, one of them dated sometime in 1839 or 1840, and the other dated the 11th June 1841, and that Stapler paid the $500 note seven or eight years ago, and on the $1000 note made in 1839 or 1840, he paid $400 in January 1844, $500 in March 1848, and $310 in February 1849, and on the other $1000 note paid $225 or $250 in the summer of 1848.

This is all the material evidence in the record.

The chancellor being of the opinion that the fraud was made out by the proof, decreed that Stapler deliver up the slaves in his possession, within thirty days, to the register, who was ordered to sell them and pay the proceeds to the complainants, and if they should not sell for enough to pay the debt, the register was directed to take an account of the value of George, the slave stated in the answer of Stapler to have been sold, and of the annual value of the services of the slaves that have continued in Stapler's possession, and these amounts being ascertained, to issue execution against Stapler and the securities on his bond for so much thereof as should be requisite to satisfy the judgment, unless paid by the defendants in ten days thereafter. The register was further directed, that if Stapler should fail to deliver the slaves in his possession to the register, within thirty days after the rendition of the decree, to issue execution against him and his securities on the bond for the amount of the judgment and costs.

Belser and Rice, for the plaintiffs in error:

1. The defendant, as shown by the pleadings, did not live in this State; *he* was not about to remove out of it. The property sought to be condemned was out of the State of Alabama, in the State of Georgia, and the residence of Stapler was at Columbus in the State of Georgia.—Lucas v. Hickman, 2 Stew. 111; Mallocks v. Trenam, 3 Johns. Ch. 75; Story's Com. on Eq. 691. The chancellor should on the bill and answer have refused to decree against the securities on the *ne exeat* bond. The answer of Stapler denies the allegations of

the bill on which the *ne exeat* was based and granted, and the complainant *has taken no proof to sustain those allegations. This ousted the court of chancery of jurisdiction before decree, and it never returned to it afterwards, if it ever had any.*

2. Upon the bill, answer and proofs, the decree should have been adverse to complainant. The complainant's evidence is not sufficient to overthrow defendant's answer and proof; and when this is the case, the defendant must prevail.

3. The chancellor's instructions to the register were premature, and several of them are founded in error, particularly as to Abercrombie et als., Stapler's sureties on the *ne exeat* bond.

4. The testimony of the witness Park, if he is not incompetent, is not of that clear character as to make him a creditable witness, and the main part of his testimony derives no aid from Kelly's evidence.

5. There should have been no estimate of the hire of the negroes before the bill was filed, and particularly of the boy George, whom Stapler had parted with.

6. The orders to issue the execution, given to the register, are erroneous. They are premature, and not maintainable according to practice.

7. *There is no equity in the bill, as a proceeding for a ne exeat. It is never allowed, merely against a fraudulent grantee, and he residing out of the State, and on a demand against another. The complainant has no debt or ascertained demand against Stapler. His demand is against Hargrove.*

8. There is no positive threat shewn in the bill that Stapler was about to remove. Merely avering information to such effect is not sufficient. *It should be distinctly stated on information and belief, that the fact is so.*—3 Johns. Ch. 412, § 75.

9. The cases cited by Judge Heydenfeldt are not like this. They are bills filed not against third persons, who are fraudulent grantees, and who owed the complainant no debt.—Massie v. Watts, 6 Cranch, 157 to 160.

HEYDENFELDT, for defendant.

DARGAN, C. J.—The plaintiffs in error contend that the bill is without equity, that the evidence is insufficient to warrant the decree, and that the directions to the register are erroneous.

We think the equity of the bill cannot be questioned. It charges a fraudulent transfer of the slaves by Hargrove to Stapler, who, it is alleged, has removed them from the State, so that they cannot be subjected to the payment of the judgment by execution at law. It is unnecessary to quote authorities to show that a court of equity, when it has jurisdiction over the persons, will never permit a fraud to defeat a creditor, when the fraud is once established, however cunningly it may be devised; but if we were to hold that the bill is without equity, merely because the properly is beyond the jurisdiction of the court, we should not only establish an exception to a most salutary rule, but would be declaring to fraudulent debtors that if they can procure some one to remove their property beyond the jurisdiction of the courts, they may enjoy the profits arising from it, and no relief can be afforded against them and their confederates, notwithstanding they may be subject to our jurisdiction. To establish such a rule as this would be to give fraud *the mastery of the law.* A court of equity acts *in personam*, and when it has jurisdiction over the person, will afford relief against fraud, without regard to the fact whether the property, in reference to which the fraud has been committed, be within the jurisdiction or not.—Briggs v. French, 1 Sumn. 540. The relief, too, will be adapted to the equity and justice of the case, and if the fraudulent grantee will not return the property, so that it may be appropriated to the payment of the debt, he may well be charged with the value of it.

We do not think it necessary to examine in detail the evidence. We are, however, satisfied that the evidence afforded by the depositions of the witnesses, in connection with the letters written by Stapler, and which are attached to the deposition of the witness Park, is sufficient, notwithstanding the denials of the answer, to establish the allegations of the bill, and that the complainant is entitled to the relief sought.

Whether the case was a proper one for a writ of *ne exeat*, or whether the affidavit was sufficient to authorise its issuance, are questions we have nothing in the present condition of the case to do with. The equity of the bill can in no case be made to depend upon the process that may be necessary to bring the parties before the court, or to compel them to perform the final decree that may be rendered in the cause. We shall there-

fore decline to examine the questions made in argument to show that this writ could not properly issue in this case, as well as the question of the liability of the securities given by Stapler to obtain his discharge from the custody of the sheriff. These questions can arise only, if ever, when the securities are brought before the court in a proper manner, and move there to obtain relief from their bond.

The chancellor, however, erred in the decree rendered. He instructs the register to take an account of the value of the services of the slaves and the value of George, the slave alleged to have been sold by Stapler; also, if Stapler fails to deliver the slaves admitted to be in his possession, within thirty days from the rendition of the decree, the register is directed to issue execution for the whole amount of complainant's judgment against him and the securities on his bond. When a reference is ordered to ascertain the amount of money that is due to the complainant, or the value of any property with which the defendant is charged by the decree, until the report of the register comes in and is confirmed, no execution should issue. The defendants here have the right not only to controvert the amount actually due on the judgment, but also the amount of the hire of the slaves, as well as their value; and they have the right to except to the report of the register, and to claim the judgment of the court upon their exceptions. All this is denied them by the directions to the register; and what is a still more glaring error, the execution is ordered to issue against the securities of Stapler on his bond, before they have had an opportunity to contest their liability on it. For these reasons the decree must be reversed, and we must proceed to render the decree that should have been rendered in the court below.

It is therefore ordered, adjudged and decreed, that the slaves mentioned in the pleadings, and admitted in the answer of Stapler to be in his possession and under his control, be condemned to the satisfaction of complainant's judgment against William D. Hargrove; and it is refered to the register of said chancery court to take an account and ascertain how much is due thereon for principal and interest. He will also take an account of the value of the slave George, alleged to have been sold by the defendant Stapler, as well as the value of the other

slaves condemned in satisfaction of complainant's demand.—He will further take an account of the value of the hire of said slaves, which have not been sold, from the time that said Stapler obtained possession of them up to the time of taking the account, and he will make report of all the matters here refered to him to the next term of said chancery court.

It is further ordered and decreed, that the defendants in error pay the costs of this court, and this case is remanded that further proceedings may be had in accordance with the above decree.

MARSHALL *vs.* WOOD.

1. A warranty of soundness is broken, if the property is diseased at the time of the sale, whether the disease be of a permanent character or not, and the vendee is entitled to recover to the extent of the damage he has sustained by the breach.
2. The vendee, after a breach of warranty, may retain the property in its unsound condition, and rely upon the warranty. He is not bound to accept the proposition of the vendor to rescind the contract and refund the purchase money, with interest, &c.; nor can his promise to consider such proposition, and to give him notice whether he will accept it or not, before he institutes suit, which he fails to do, deprive him of his action, or amount to a waiver or discharge of the vendor's liability—especially where it is not shown that the latter is placed in any worse condition by the want of such notice.
3. In an action for a breach of warranty of soundness in the sale of a slave, the true measure of damages, where the vendee retains the property, and it is of any value, is the difference between its actual value at the time of the sale and the value it would have possessed had it conformed to the warranty—holding the price paid as evidence of the latter—to which the jury may add interest on such difference, and money necessarily paid to a physician in attempting to cure the disease.

Error to the Circuit Court of Macon. Tried before the Hon. Nathan Cook.

This was an action of assumpsit, instituted by the defendant against the plaintiff in error to recover damages for the breach of warranty of a female slave. The plaintiff having

introduced proof, tending to show that the slave in question with her child, was purchased by him from defendant at the price of six hundred dollars under a warranty of soundness, &c., that the woman alone, if sound, would have been worth $550 at the time of sale, that she was a short time after the sale affected with a disease, termed by medical men Amenorrhœa, in consequence of which she was not worth more than two hundred dollars, and that the disease was apparently of several years standing, the defendant proved that about a month after the sale he proposed to the plaintiff to take the slave back and secure to him the purchase money paid, with interest, &c., payable one half in three weeks and the other half in three months, and that the plaintiff promised to consider the proposition and to give him notice of his determination after consultation with his counsel, before he proceeded to institute suit against him, but which notice he never gave. The defendant offered to prove that at the first trial term of the cause, he tendered to the plaintiff the purchase money of both the slaves with interest, physician's bill and costs of suit, but the court disallowed the proof. There was no evidence that the woman had recovered from the disease with which she was affected.

The defendant asked the court to charge the jury:

1st. That before the plaintiff can recover he must prove to their satisfaction that the negro woman was affected at or before the sale with the same disease, called Amenorrhœa, with which she was affected subsequently to the sale, which charge the court refused, and instructed the jury that the warranty was broken if the woman was diseased at the time of the sale and so continued afterwards; and that it was immaterial whether the disease was the same with which she was subsequently affected or not:

2d. That if the plaintiff promised to consider the defendants proposition to rescind the contract of sale and to give him notice of his determination, before he proceeded to institute suit against him, he had no right to sue until such notice was given, which charge the court also refused, and instructed the jury, that they were not to look to the testimony on that subject for any purpose whatever, not even for the purpose of ascertaining the estimate which the plaintiff himself placed up-

on the slaves. The remaining charge asked and the charge given in response to it are set out in the opinion of the court. The ruling &c. of the court, the defendant now assigns as error.

GUNN, for the plaintiff in error:

1. In actions to recover for breach of warranties of soundness, it is not every disease which will constitute a breach; and if the slave at the time of the sale was affected with one disease that would have rendered her less valuable, but of which she had recovered, and was afterwards affected with another having no connection with the former, the warranty is not broken. Margetson v. Wright, 8 Bing. 454; 4 Phillips' Ev. 194, note 300; Marshall v. Gantt, 15 Ala. Rep. 686.

2. In actions sounding in damages, evidence is legitimate which shows the estimate placed upon the property by the parties. Surely, then, the refusal of the defendant in error to be reimbursed his money, expenses, costs, &c. ought to have been submitted to the jury as proper data for their consideration in determining the extent of the injury sustained.—Cox v. Walker, 6 Ad. & E. 523; Hogan v. Thorington, 8 Porter, 430; Kornegay v. White, 10 Ala. Rep. 258; Willis et al. v. Dudley, ib. 741; Melton v. Rowland, 11 ib. 739.

3. A plaintiff is in general entitled to recover for all losses resulting directly from a breach of warranty; thus in some cases he may recover even beyond the price paid—not only the purchase money, but all proper expenditures for medical aid. This is the doctrine of the court in Hogan v. Thorington, *supra*, in which there was a reversal because a similar charge to the one here objected to was given.—See Lightner v. Martin, 2 McCord's Rep. 214; Chase v. Maynard, 6 A. & E. 519; 1 Taunton, 566; 3 Esp. Rep. 82; 5 Wend. § 535; 1 N. & McCord's Rep. 210; Garrett v. Stewart, 1 McC. Rep. 514; Ware v. Weatherall, ex'r, 2 ib. 413; which authorities with those that here follow, I think, with respect to the opinion of the majority of the court in Willis and another v. Dudley, 10 Ala. Rep., go to show that the opinion of the Chief Justice is the better law—and further, that the authorities upon which the majority of the court based their opinion confounded the terms price paid and value, and when examined carefully, true

value in the most of them, means nothing more or less than the price paid, or the value placed upon the property in the purchase.—See Gregory v. McDowell, 8 Wend. 435; Shephard v. Hampton, 3 Wheat 200; Blydenburgh v. Welsh, 1 Bald. Rep. 331. It is the price, the market price of the article that is to furnish the measure of damages. Now the market price is the value—the rate at which the thing is sold. To make a market there must be a buying and selling, purchase and sale—the purchaser must be content with the price of that day, and cannot claim the benefit of a subsequent increase of value—a thing is worth what it will bring.—Miller v. Mariner's Church, 7 Greenl. Rep. 51. Under any other view, the seller attempting to get the best price for his property is presented as selling a slave for about $200 less than she was worth, or considered to be worth, if as she was sold; the policy of the law is that the remedy should be commensurate with the injury. In this case $600 is paid for a woman and child, and being of some value, he ought not to be in a better situation than if valueless; his recovery in the latter case would be the purchase money, physician's bill, interest, &c., whether the slaves, if as represented to be, were not worth one half that sum.—1 H. Blackf. 17; 7 Taunt, 153; 1 ib. 566; 2 Term Rep. 745; 3 Starkie's Rep. 32; 2 Chitty's Rep. 416; 3 Starkie's Ev. 1666. If this be the correct doctrine, where the property is valueless, the measure of damages where the same is of some value, should be the difference between the sum given and the real value, with interest, expenses, &c.—2 Saunders' Pl. & Ev. 917; Lewis v. Peale, 7 Taunt. 153; 5 Wend. 535; 1 Johns. 517; 1 Bay's Rep. 321; 2 Greenl. on Ev. 216, § 262; Conner's heirs, v. Strode, 2 Bibb, 280; 1 Litt. 494; Marshall's heirs, v. McConnell's heirs, 3 Litt. 125.

Clopton, for defendant in error:

1. There was no binding legal obligation upon Wood to notify Marshall of his intention to sue, after the offer by Marshall to compromise by giving his note; that offer not having been acceded to by Wood. The writ was notice sufficient. Adams v. Shelby, 10 Ala. Rep. 484.

2. The evidence of a tender was irrelevent to the issue and inadmissible. There was no plea of tender. A tender is only

allowed where a debt is due on specialty or simple contract, which is either certain, or capable of being reduced to a certainty by mere computation.—3 Stephens' Nisi Prius, 2599; 2 Saunders on Plead. & Ev. 833. After a contract is broken a tender cannot be effectual to bar the action for damages. Suffolk Bank v. Worcester Bank, 5 Pick. 106; 8 East, 168. The tender was made after the commencement of the suit.

3. In an action for the false warranty of a slave, the plaintiff is entitled to recover to the extent the slave is impaired in value by the disease existing at the time of the purchase. Hogan v. Thorington, 8 Porter, 428; Kornegay v. White, 10 Ala. Rep. 255; Marshall v. Gantt, 15 ib. 686. There is no evidence of a cure being subsequently effected.

4. A warranty of soundness covers all diseases which affect the value of the thing warranted, and it was not incumbent upon Wood therefore to prove that the slave, at the time of the sale, was affected with the particular disease Amenorrhœa. The declaration alleges no particular disease.—Kornegay v. White, 10 Ala. Rep. 255.

CHILTON, J.—1. There can be no question but that the warranty was broken, if the property at the time of the sale, was unsound, and any damage which was the proximate result of such unsoundness was properly recoverable by the plaintiff in the court below. If the disease with which the slave was afflicted at the time of the sale, rendered her less valuable than she would have been if sound, the plaintiff below had the right to recover to the extent of the damage he sustained in consequence of such unsoundness, whether she recovered from such uasoundness or not. But he could not recover for unsoundness occuring subsequent to the sale, and which was not connected with, and did not result from the former disease existing at the time the sale was made.—Marshall v. Gantt, 15 Ala. Rep. 686-688, and authorities there cited. It was not necessary in order to entitle the plaintiff to recover, that he should have proved that the disease with which the slave was affected at the time of the warranty, was of a permanent character; any unsoundness, lessening her value and depriving the party of her services, or putting him to trouble or expense in effecting a cure, will sustain the suit.

Chitty on Con. 138; 10 Ala. Rep. 255. There was then no error in the first charge given by the court in lieu of the charge refused, nor in the refusal to give the charge first prayed for by the counsel for the defendant below.

2. It is not necessary for the vendee to return the property or offer so to do, but he may keep it in its unsound condition and rely upon the vendor's warranty. The offer therefore of the vendor to take the slave back and refund the purchase money in future, securing it by note with good security and paying the costs, expenses, &c., was properly excluded as evidence, since it was an offer the plaintiff below was not bound to accept, and refused to accept. That he said he would consult his counsel, and notify the vendor whether he would accept his proposition or not, before he instituted suit, but which notice he failed to give, did not deprive him of his action on the warranty. Such undertaking did not amount to a release or discharge of the vendor's liability, especially as it is not shown he was placed in any worse condition on account of the want of such notice. This view disposes of the exclusion of the evidence of tender, and the second charge asked to be given in behalf of the defendant below.

3. The court was requested to charge the jury that if they should believe there was a breach of warranty, the measure of damages was the difference between the true value of the slave at the time of the sale, and the value as estimated by the parties in the trade, together with the necessary expense and loss of hire up to the time the vendor offered to rescind. The court refused this, and charged that the measure of damages was the difference in value between the slaves as they actually were and as they were represented to be—perfectly sound, adding the loss of hire and expense of physician's bills up to the time of the offer to rescind. We cannot readily perceive how the court could make the offer to rescind terminate the right of the plaintiff to recover for the loss of hire, since the evidence of such offer was excluded from the jury with instructions that they should not regard it for any purpose. But as the charge asked, to which this is a response, and in reference to which this must be construed, fixed upon that time for terminating the right to recover for the loss of the hire, and as the defendant was not injured thereby, if oth-

wise correct, we should not feel authorised to reverse for that reason. Does the charge assert a correct legal proposition? As to this point I am disposed to follow the rule laid down by this court in its previous adjudications in cases similar to this, and to hold, the true rule to be, the difference between the actual value, and the value the article would have possessed if it had conformed to the warranty—holding the price paid as evidence of that value.—Kornegay v. White, 10 Ala. Rep. 255; see also Willis, et al. v. Dudley, 10 ib. 933; Clare v. Maynard, 7 Car. & Payne, 741; (S. C. 32 Eng. C. L. Rep. 713); Sedgwick on the Meas. of Dam. 290, *et seq.*, and authorities there cited. True, under a state of facts entirely different from that in the case before us, in the case of Hogan v. Thorington, 8 Porter's Rep. 428, the charge given by the Circuit Court was almost identical with the charge here given, except interest instead of the loss of hire was added. The charge was, "that the true measure of damages was the difference between the real value of the slave at the time of the warranty, and what would have been her value if sound, with interest thereon." But it was said by the Chief Justice, in delivering the opinion, that "both reason and authority would graduate the defendant's recovery by the injury he has suffered in consequence of the false warranty;" and it was held, that although the slave at the time she was warranted, was unsound, yet if the only inconvenience attendant upon such unsoundness was the expense and trouble incured by the defendant in curing her, he was only entitled to recover for such expense, &c. It is manifest that in the case cited, where the party had sold the property for more than it cost him, and the only damage he had sustained was the expense of curing her and loss of time &c., it was just that he should only be compensated for the loss he had sustained. But the case at bar does not come within the principle settled by that. Here the party retains the property, and so far as the proof discloses, no cure has been effected. It comes within the general law, as recognized and settled by the decisions in Kornegay v. White, 10 Ala. Rep. 255, and Marshall v. Gantt, *supra.*

In the first case it was held, that "the plaintiff was entitled to recover to the extent the slave was impaired in value by the disease existing at the time of the warranty, and money

necessarily paid to physicians in curing the disease may be considered by the jury," and further, "that in estimating the damages, the jury may allow interest on the difference between the real value of the slave at the time of the warranty, and his value if sound, according to the warranty, from the time of sale."—Voorhees, et al. v. Earl, 2 Hill's Rep. 288; Cary v. Graman, 4 ib. 225; Sedgwick on Dam. 290–1–2; Story on Con. § 552; Cozzins v. Whitaker, 3 Stew. & Porter's Rep. 330. But the charge in this case, did not adopt the rule above laid down, so far as respects the interest on the difference in the value, but instructed the jury to enquire into the loss of hire. This would be to make the defendant compensate, not for the injury sustained, but for the probable profits which the plaintiff had lost by reason of the false warranty. Such a rule would be too uncertain in its application, and introduce too much confusion to justify its adoption, whereas interest upon the difference recognizes a fixed and stable rule, and one easy of application.

For this error, the judgment must be reversed and the cause remanded.

EDWARDS *vs.* LEWIS.

1. A proceeding by *supersedeas* to arrest and have entry of satisfaction of an execution, is a suit between the parties to the judgment, and the pleadings must be made up in their names. A stranger to the record, though he be the assignee of the judgment, cannot be permitted to intervene and tender an issue in his own name.
2. Where in a proceeding to have entry of satisfaction of an execution, the only issue joined is the fact of payment, proof that the judgment was assigned to a third person before the payment, does not tend to establish or disprove the issue, and is consequently inadmissible.

Error to the Circuit Court of Russell. Tried before the Hon. Jno. J. Woodward.

Belser & Harris, for plaintiff:

1. The second plea traversing the satisfaction of the judgment and execution should not have been stricken out. The object of the proceeding was to bring the parties before the court and to ascertain whether or not, the execution was satisfied, and Baker had the right to show that the plaintiff in supersedeas had not legally discharged it.

2. The assignor of a judgment cannot control the assignee in the use of the judgment.—Haden v. Walker, 5 Ala. Rep. 86; State v. Herod, 6 Blackford, 444.

3. A payment of judgment to plaintiff, after notice of assignment, is not a satisfaction.—Laughlin v. Fairbanks, 8 Missouri Rep. 367; Bebee v. Bank of N. York, 1 Johns. 531.

4. To a plea of payment, an assignment may be replied, and that the party paying the judgment had notice.

5. If Lewis was notified before he paid the judgment that it had been assigned by one who spoke understandingly, it was sufficient.—Crayton v. Clark, 11 Ala. Rep. 788; Hum v. Blight's assignees, 4 Dallas, 371.

6. The object of the supersedeas is answered when the case is in the nature of an equitable proceeding under the control of the court.

7. The court did wrong in excluding the testimony, the jury was the tribunal to determine on it, and whether or not the judgment was satisfied, under the instructions of the court.

Rice, for defendant:

DARGAN, C. J.—The plaintiff in error recovered a judgment in the Circuit Court of Russell against the defendant, for seven hundred dollars, upon which an execution issued. The defendant filed his petition for a supersedeas, alleging that he had paid and satisfied the judgment before the execution came to the hands of the sheriff, and thereupon prayed that the execution be superseded. At the April term 1849 of the Circuit Court, the plaintiff, Edwards, filed his plea to the petition, denying that the judgment was paid and satisfied. Benjamin H. Baker, as it appears from the record, likewise came and avered that on the 10th day of November 1848, Edwards, the plaintiff, assigned the judgment to him for a valuable consideration, and that said Lewis had notice

of the assignment. Lewis moved the court to strike out the matter alleged by Baker, as a plea in bar to the relief sought by the petition. The motion was granted and the cause was submitted to a jury on the plea tendered by Edwards, putting in issue the fact of payment alone. On the trial, it appeared that Lewis had paid the judgment to Edwards, and to avoid the effect of this proof, it was shown that Edwards had assigned the judgment to Baker before the payment; and there was also proof tending to show that Lewis had notice of the assignment. This proof was rejected by the court, and the plaintiff excepted.

The plaintiff insists that the court erred in rejecting the plea filed by Baker, and also in rejecting the proof showing the assignment of the judgment.

1. At common law, if an execution issued on a judgment that had been paid or satisfied, or the defendant had any good legal reason why the execution should not be enforced against him, the writ of *audita querela* was the proper remedy by which he could bring his defence before the court and obtain relief.—1 Bacon's Ab. 307; 3 Black. Com. 405. This writ was the commencement of a suit by the defendant against the plaintiff in the original judgment, in which the defendant regularly declared, setting forth the grounds of his defence to the original judgment and exeeution. To this declaration the plaintiff in the judgment was required to plead or demur, and thus the issues were present to the court in the same manner that issues of fact or law are made up in ordinary suits. See the form of the pleadings in Turner v. Davis, 2 Saunders' Rep. 365. This writ, however, has gone out of use, and in lieu of it a summary jurisdiction is exercised by the common law courts, by granting relief on motion and staying proceedings in vacation by the order of a judge. By statute in this State, the judges have power to grant writs of supersedeas in vacation, when it shall appear that the execution has improperly issued. This is done by petition, setting forth the facts on which the defendant relies as the grounds for superseding the execution. When the writ is issued by the order of the judge it must be considered in the nature of a suit—Shearer v. Boyd 10 Ala. 279, and the parties must proceed to make up the issues and present the questions in controversy to the court

by pleading, in the same manner required in a common suit. As the petition, however, states the facts on which the defendant relies, this, under our practice, is properly considered as the declaration that would have been required of the defendant in the judgment at the common law, and to this the plaintiff may plead or demur, as his defence may require, or he may see proper. This seems to be the course indicated by the previous decisions of this court, and we think, it is the correct practice. Whether then, we consider the petition for a supersedeas, as a continuation of the original suit, or in the light of a new suit growing out of the old one, it is nevertheless a suit between the same persons, that are parties to the judgment. Being a suit between the parties to the judgment, the pleadings must be made up in their names, and a stranger to the record cannot be permitted to intervene and tender an issue, without violating the first rules of pleading. The plea tendered in the name of Baker was therefore properly rejected by the court.

It is true that courts of law will protect the interest of the assignee of a judgment, or of any other chose in action, and will not permit the assignor to defeat the interest of the assignee by any act of his own, or by a combination with the party who owes the money; and if the money be paid after notice of the assignment, such payment will not discharge the demand, but the assignee may use the name of the assignor and recover it, notwithstanding such payment. But as the legal title is not in the assignee, he cannot sue in his own name, but must use the name of his assignor. So if proceedings be commenced by the defendant to the judgment to have satisfaction entered of record, or to supersede the execution, the assignee may resist them, and for this purpose may use the name of his assignor, but being a stranger to the record, not a party to the suit, and having but an equitable right, he is prohibited from pleading in his own name.

2. This brings us to the question whether the court erred in rejecting the proof tending to show the assignment of the judgment before the payment. The only issue joined between the parties was the fact of payment to Edwards. This Lewis proved and to rebut this, proof of the assignment before the payment was offered. We are clearly of the opinion that it

was properly rejected. This evidence did not tend to establish or disprove any fact in issue, but its entire effect was to show matter in avoidance of the payment, which alone was in issue. The evidence must be confined to the issue submitted to the jury, and if it neither tends to prove or disprove the facts embraced within the issue, it must be rejected.—1 Greenl. Ev. § 51. We can see no error in the ruling of the Circuit Court and, although it may be a hard case on the assignee of the judgment, if indeed the defendant paid the judgment after notice of the assignment, yet we cannot violate established rules of practice to relieve him from his error in pleading.

The judgment must be affirmed.

KAVANAUGH & WIFE *vs.* THOMPSON & WIFE ET ALS.

1. On the marriage of an administratrix, the husband becomes administrator in her right for his own safety, and takes upon himself all the duties, and is entitled to all the privileges, which belonged to her before the marriage: He is therefore the proper representative of both, and service of citation upon him alone is sufficient to support a final settlement of the administration.
2. A joint administrator cannot complain that separate judgments are rendered against him and his co-administrator for the assets found in their hands respectively: It is error without injury, and constitutes no ground for reversal.
3. On the final settlement of the estate in the Orphans' Court, the distributees sought to charge the administrators with the value of four slaves, which they had returned in the inventory, and produced in evidence the record of a judgment in detinue, rendered some eight years before, in favor of the administrators, as such, against one E. L., showing the recovery of the slaves in question. The administrators, to show that the slaves nevertheless were not assets of the estate, offered to prove that during the pendency of the suit, E. L., who was insolvent, filed his bill in chancery against them, claiming one half of the entire estate of their intestate; that a compromise was effected, by which it was agreed that E. L. should dismiss his bill, relinquish his claim to all the estate, except the slaves sued for by the administrators, and allow judgment to go against him for *them*, for the purpose of protecting them against liability for his debts; and

that, this arrangement having been carried out, one of the administrators, in his own right, afterwards purchased the slaves from E. L. The court rejected the proof. *Held*—1st. That the trust in favor of E. L., which it was the object of the evidence to establish, was void, by reason of the fraud intended his creditors, and being void, the exclusion of the evidence was not erroneous, since its admission could not possibly have affected the result. 2d. That by the recovery, the slaves or their alternate value, if insisted on by the distributees, were assets of the estate, and the administrators chargeable with such value for neglecting to enforce the judgment.—3d. That the title to the slaves, acquired by the purchase from E. L., cannot, under the circumstances, be set up against that of the estate.

4. Where administrators are guilty of a conversion, in permitting a slave belonging to the estate to go into the possession of a third person, and the slave is lost, the distributees may elect either to accept another slave that the administrators have substituted in the stead of the one lost, or to charge them with his value. If they elect the latter, the court may properly charge the administrators with the amount recovered by them from the person in whose possession the slave was, when lost, as the value of such slave.
5. It is the duty of the court to protect the interest of minors, by permitting them, where they have an election, to make *that* which will be most advantageous to them, even after they have indicated an intention to make one which is less so.
6. Administrators cannot complain that a decree, regular in form, is rendered against them in favor of infant distributees, without the appointment of guardians *ad litem*.

Error to the Orphans' Court of Madison. Tried before the Hon. C. C. Clay, Judge.

George Connelly and Catharine Lewis, the widow of the deceased, were appointed in 1832 administrator and administratrix on the estate of William Lewis. Catharine, the widow, subsequently intermarried with Cortez D. Kavanaugh, one of the plaintiffs in error. Connelly and Kavanaugh, the husband, having been cited to a final settlement, they appeared, and each of them filed a separate account, and on the settlement, which was had on the 2d Monday in December 1846, it being made to appear that from the year 1832 to the last of the year 1835, the estate was in charge of and managed exclusively by Connelly, and that after that time it was turned over to and exclusively managed by the administratrix, or by her and her husband, Kavanaugh, the court proceeded to settle the administration of each separately, and to render decrees accordingly

in favor of the distributees, who are the defendants in error. By a bill of exceptions taken in the settlement of the administration of Kavanaugh and wife, it appears that the distributees moved the court to charge the said Kavanaugh and wife with the sum of $2450, the value of four slaves, with interest thereon, and in support of the motion read to the court a transcript of the proceedings and judgment of the Circuit Court of Madison and of the execution issued thereon in an action of detinue instituted by said Catharine Lewis as administratrix and Connelly as administrator, and revived in the names of Kavanaugh and Connelly, administrators, against Eli Lewis, and which showed a recovery by them at the fall term 1838 of said court of the slaves, with the value of which Kavanaugh and wife are now sought to be charged, and that the execution issued thereon was stayed by the plaintiffs. Rebutting evidence was offered by the said Kavanaugh and wife, which is fully set out in the opinion of the court, and which the Orphans' Court excluded. The distributees further sought to charge the said Kavanaugh and wife with the hire of a slave by the name of Jack, then in Kavanaugh's possession, which was resisted by them, and a bill of sale produced in evidence, by which it was shown that said slave was conveyed to said Kavanaugh by Hollowell and Echols in February 1838, for the recited consideration of $1050. At a subsequent stage of the trial, Kavanaugh offered to account for said slave and his hire as assets of the estate. It was then made to appear that the estate owned a slave by the name of Little Bill, whom one Blevins carried to Dallas county and placed in charge of one Michael Kenan, who took him to Mobile, where he died; that said Blevins purchased Jack, who was taken by Kavanaugh in lieu of Little Bill and held by him from that time as the property of the estate; and that Kavanaugh subsequently caused suit to be brought in the names of the administrators, but for his own benefit, against Kenan, in which he recovered $1680 for Little Bill. The distributees thereupon electing to charge the administrators with the value of Bill, the court refused to regard Jack as the property of the estate, and suspended the settlement until a transcript of the judgment against Kenan could be procured from the Circuit Court of Mobile, in which it was rendered, when it charged said Kav-

anaugh with the amount of said judgment with interest. The said Kavanaugh and wife now assign as error—1st. That the decree was rendered without notice to the wife. 2d. That the court rendered separate decrees against joint administrators. 3d. That the court charged them with the value of the four slaves. 4th. That the court rejected the evidence in reference to said slaves. 5th. That they were charged with the recovery for Little Bill. 6th. In acting on evidence not judicially before it, and ordering a transcript to be procured from Mobile.

Robinson, for the plaintiffs in error:

1. The judgment against Catharine Kavanaugh is erroneous, because no process was ever issued against or served upon her, nor does the record show that she appeared by herself or otherwise.

2. Kavanaugh and wife and Connelly were joint administrators. It appears from the account and decree against Connelly, that he had all the property in his possession from 1832 till 1835. After this he placed the property in the hands of Kavanaugh. Therefore, they were jointly and not separately liable to the heirs of Lewis, and a joint account and decree should have been rendered against all.—Langford v. Gascoigne, 11 Ves. 333; Little et al. v. Knox, adm'r, at January Term 1849. By thus stating the accounts separately, the court deprived the sureties of the right to go against Connelly for the sum found against Kavanaugh and wife. Being jointly liable to the heirs of Lewis, the Orphans' Court had no power to ascertain and act upon the separate liability of each. The separate liability of each can only be ascertained by a direct proceeding between the administrators. The whole jurisdiction of that court is conferred by our statutes, and they do not give it this.

3. The testimony of McClung and others and of said suit in chancery, offered and rejected, did not contradict the record of the suit at law, and should have been received and considered by the court. Being considered, it tends strongly to show that the intestate held the one half of the whole of his property, real and personal, in trust for his brother Eli Lewis. If this be its tendency, how can it be said to contradict the

judgment at law? To establish such a trust, chancery alone could aid him. If the doctrine contended for below be correct, then it would be impossible ever to establish a trust against a judgment at law. This is surely wrong. Again, when considered, we think the testimony clearly shows that the administrators, by surrendering the four slaves to Eli Lewis in satisfaction of his claim to one half of all the property, not only acted in good faith, and as prudent men would have acted in their own affairs, but that they secured for the estate a real and substantial benefit. For had Eli Lewis succeeded, (for which his chance was fair,) he would have taken from the estate property of much greater value.—2 Williams on Ex'rs, 1109; Blue v. Marshall, 3 P. Wms. 381; Ligh v. Holloway, 8 Ves. 213; Meeker v. Vanderveer, 3 Green, 392; Thomas v. White, 3 Litt. 184; Head v. Perry, 1 Monr. 256; Dawson v. Clay's Heirs, 1 J. J. Marshall, 167; Griswold v. Chandler, 5 N. H. 492. In this last it was expressly held that an administrator is not bound to litigate a *doubtful* claim.—Further—this proof shows that the administrators never had the possession of the slaves; and the title being doubtful, and they not bound to litigate it, they cannot be charged with the value of the property.

4. As to the slave Little Bill, the proof shows that very soon after his death, Blevins, in discharge of his liability, bought another of greater value and put in his place, which other was accepted by the administrators and kept and used as a part of the estate. Here again, the estate was benefitted by getting a slave of greater value than the one lost.

5. It further appears that the heirs of Lewis ratified this transaction, by seeking on the settlement to charge the administrators with his hire. This was at first resisted, but afterwards assented to by the administrators. It was clearly within the election of said heirs to take Jack in the place of Bill, and after so electing, the court had no power to disregard that election and to charge the administrators with the amount of the judgment against Kenan.

Ormond, for defendant:

1. It cannot be objected that Mrs. Kavanaugh was not served with process. By the marriage her husband became the ad-

ministrator, as he is responsible for her acts as administratrix; his appearance, therefore, is an appearance for her.

2. Although Mrs. Kavanaugh administered jointly with Connelly, and executed a joint bond with him, it is no error of which she can complain that the account has been stated separately. Although each may be bound to the distributees for the acts of the other, it is to her interest that the liability should be considered several. The objection is in effect that a judgment has not been rendered against her for the amount of the estate in the hands of Connelly.

3. The record of the recovery of the four slaves from Eli Lewis by the administrators was conclusive, and the court therefore properly rejected the testimony offered that the plaintiff in error purchased the slaves with his own monies. 1st, because it contradicts the record: 2d, because it is contrary to public policy to permit a title to be founded upon a fraud committed on the creditors of Eli Lewis: 3d, because the administrators of William Lewis had no authority to make such a compromise as is stated upon the record, even if it were proved that Eli Lewis had a valid claim upon the estate of William Lewis. But lastly, it is not shown that Eli Lewis had any claim whatever upon the estate of William Lewis.—Weir v. Davis & Humphries, 4 Ala. Rep. 442; Dearman v. Coffman, ib. 521; Duffee v. Buchanan, 8 ib. 27; Key v. Boyd, 10; ib. 154; Steele v. Knox, ib. 609; Fambro v. Gant, 12 ib. 298.

4. As it respects the charge against the administrators for the recovery from the representatives of Kavanaugh, I submit that the decision of the court is correct, because the administrators had no power to make the exchange of Jack for Little Bill, but should be held accountable to the distributees for his value, of which the recovery affords the best evidence. If this is not so it can only be upon the ground that by the exchange, the slave Jack became the property of the estate instead of Little Bill, and in that event, the plaintiff in error would be liable for his value if not produced for distribution, and for his hire since 1832, when the exchange was made. Thus in all probability the judgment is for too small a sum, and the error, if is one, is beneficial to the plaintiffs in error.

5. As to the last assignment of error, see 15 Ala. Rep. 335.

CHILTON, J.—We will examine the errors assigned in their order. 1. There was clearly no error in failing to have citation served on the wife. Upon the marriage of the administratrix, the husband becomes administrator in her right for his own safety, it is said, and he takes upon himself all the duties, and is entitled to all the privileges which belonged to the administratrix before the marriage.—2 Williams on Ex'rs, 633. He was then the proper representative of both. In chancery, it is well settled that process need not be served on the wife, unless the bill seeks to charge her in respect of her separate estate, and she has no such estate in assets as administratrix.—Daniel's Ch. Pr. 191; 1 Turn. & R. 96. We think a similar practice may well obtain in the Orphans' Court, since service of the citation upon the wife would be but mere matter of form.

2. Although the distributees would have the right to complain that the court proceeded to render separate judgments against the administrators who had entered into a joint bond, we think it very clear the administrators themselves, who made no objection to such judgments being rendered separately, instead of jointly against them, cannot be heard to complain. They have not been injured, because the judgments were rendered against them for less than the court should have awarded, and to entitle the plaintiffs in error to a reversal, they must show both error and injury. It was certainly beneficial to the plaintiffs in error that no judgment was rendered against them for the assets of the estate in the hands of Connelly. Bush v. Bradford, 15 Ala. Rep. 317. Were the distributees complaining, then the authorities cited by the counsel for the plaintiffs in error would apply, for it is settled by them, that when co-administrators enter into a joint bond, they stand as sureties for each other to the distributees, who are entitled to a joint judgment against them.—Little, et al. v. Knox, adm'r 15 Ala. Rep. 576; Little, et al. v. Heard, et ux. 16 ib. 360, and are jointly bound to protect their securities upon such bond, against the acts of either administrator.

3. Upon the trial in the Orphans' Court, the distributees produced and read the record of a judgment, rendered in favor of the administrators of said William Lewis deceased, against Eli Lewis, on the 4th Monday in October 1838, in an

action of detinue, brought to recover four slaves named in the pleadings, said judgment being in the usual form, for the recovery of the slaves, if to be had, and if not to be had, then their alternate value, which was assessed by the jury. Upon this judgment it appears execution issued, and was returned by the order of the administrators on the 16th of April 1839. To rid themselves of this charge, the plaintiffs in error offered to show that Eli Lewis had filed a bill in chancery on the 19th April 1834, against the administrators and heirs of said deceased, claiming an undivided half interest in all the property of which the deceased died seized, both real and personal, and offered to read to the court, the transcript of the bill, answers, exhibits and proof taken in the cause, from which transcript it appeared that the said complainant dismissed his bill; and in connection with this, they also offered to prove by James W. McClung, who was one of the solicitors of Eli Lewis, the complainant, and a practicing attorney of said court and familiar with the proof and situation of the cause, that he, believing it best for the interest of the estate, advised the parties to make a compromise of a certain character, which he afterwards learned from both the complainant and administrators had been made, but said witness could not remember the terms of the compromise. The plaintiffs in error also offered to prove by said witness, that he believed said Eli had a fair prospect of recovering half the estate, but as said Eli was largely insolvent, a recovery could not have been of much benefit to his own family, and he therefore thought it best for all parties that the compromise should be made. Kavanaugh then proposed proving by other witnesses, that the terms of said compromise were that Eli should dismiss his said chancery suit, and that in consideration thereof, said administrators should abandon all claim to the four slaves, who are named in the above recited judgment, and which were then in the possession of Eli, but which had been returned by the administrators in their inventory as a part of the assets belonging to the estate; also, that they should surrender the value of the hire of said slaves, and acquit said Eli of all debts due from him to said estate. It was further agreed, as a part of said compromise, that the judgment above refered to should go for the four slaves in favor of said administrators for the

purpose of protecting said property in the hands of said Eli from liability for his debts. Said Kavanaugh also offered to prove that he afterwards purchased said slaves from Eli Lewis with his individual funds. The court excluded the proof thus proposed to be made, upon the ground that the administrators could not condradict the record by parol evidence. Perhaps such exclusion could not be justified upon the reason assigned by the court, since the effect of the evidence was not to contradict the record of the judgment, but was consistent with it. But we think there is another ground which will fully sustain the action of the court. The object of the evidence was to show that although the judgment rendered in favor of the administrators who sued, as such, to recover the slaves, vested the recovery in them as administrators, and made the same assets in their hands, yet there was a trust existing in favor of the said Eli Lewis, which showed that the judgment in fact was not assets. This trust was, that the administrators should hold the recovery in trust for the sole benefit of Lewis to screen the property from his debts. We are aware of no principle of law which would authorize this, or enforce such trust. It could not be contended that Eli could in equity set up such trust to avoid the satisfaction or collection of the judgment. However fraudulent it might be against his creditors, it is obligatory as between the parties if they choose to insist on it, and as the administrators are entitled to it in *auter droit*, and as in the event of their going out of office and the appointment of a successor, the judgment would by operation of law, in virtue of his appointment go to him, the administrators, when the distributees insist on its collection, have no right to release or discharge the party from it, without rendering themselves liable for the amount. They cannot be heard to say any more than Eli Lewis, when sought to be charged with the judgment, we merely agreed to make it assets for the purpose of screening it from Lewis' creditors, and not for the purpose of distribution. No court will lend its aid thus to consummate or protect a title founded in fraud, but will treat the judgment as valid, and in good faith the property of the estate. Such doctrine is indispensable to the purity of the law, and is demanded by sound public policy. Since then, the legal title to the slaves, or their alter-

nate value, is in the administrators as assets, and the alleged trust is void, as contravening public policy, it is very clear the distributees had a right to charge the administrators who refused to enforce the judgment, and that the exclusion of the proof, which could not possibly have affected the result was not erroneous.—Duffee, adm'r v. Buchanan and Wife, 8 Ala. Rep. 27; Williams on Ex'rs 635.

These slaves were returned by the administrators as assets belonging to the estate, in the inventory which they filed in the Orphans' Court. They were in the possession of Eli Lewis, and a solemn judgment of the court is shown by which they recovered said property from Lewis, which property they now have in possession. We think, under such circumstances, it would be to introduce a new and very dangerous principle of decision to hold that the administrator may set up in himself as against the estate an adverse title, acquired from one in whose behalf he insists the judgment was a device to defraud creditors. We find no authority to sustain such a position and cannot give it our sanction.

4. In respect to the slave called Little Bill, we regard the decree of the Orphans' Court clearly defensible. The administrators were guilty of a conversion by permitting him to go into the possession of Kenan, and the recovery in their names against him ascertained the value of the boy—at least, the distributees were willing to take the recovery. The general rule is that the trustee can make no profit to himself out of the trust fund. If he deal in it, or exchange it for other property, it is for the *cestuis que trust* to elect whether they will hold him bound for the value of the trust effects so disposed of, or will take the property obtained in exchange, or profits of the negotiation. According to this principle, the distributees of this estate were not bound to accept the slave Jack, which the administrators received from Blevins in the place of Little Bill, but they could elect to charge the administrators with the value of the latter. This, they did, and in our judgment, the court very properly charged the plaintiffs in error with the amount recovered by them from Kenan as the price of Little Bill.

5. That the distributees at first sought to charge the ad-

ministrators with the hire of Jack, and which the administrators resisted, claiming him as their individual property, furnished no ground for refusing them afterwards the permission to elect to hold the plaintiffs in error responsible for Little Bill. It was the duty of the court to protect the interest of the minors in permitting the most advantagous election to be made. 15 Ala. Rep. 86.

The view we take of this case renders it unnecessary to go into the question as to the right of the administrators to compromise doubtful claims, or to dispose of the property of the estate by private arrangement, in the extinguishment of claims against it.

6. It is objected that no guardians *ad litem* were appointed for the infant distributees. Were they, or any one for them complaining, this would be erroneous, but for aught that appears the decree may be highly beneficial to them, and they would be injured by its reversal. The form of the decree in their favor "that they recover by their guardians" &c., was correct—See Fagan's adm'rs, v. Fagan's distributees, 15 Ala. Rep. 335.

We can perceive no error in the record available to the plaintiff in error, and the decree of the court below must be affirmed.

Parsons, J., not sitting.

SPENCE *vs.* SIMMONS ET AL.

1. A judgment *nisi*, which does not designate the party in whose favor it is rendered, is insufficient to support a final judgment.

Error to the Circuit Court of Coosa. Tried before the Hon. Geo. D. Shortridge.

THIS was a proceeding by *scire facias* by the defendants against the plaintiff in error as a defaulting witness. A judgment *nisi* was rendered, a copy of which will be found in the opinion of the court, and the plaintiff failing to appear and show cause to the contrary, a judgment final was rendered at a succeeding term. This judgment is now assigned as error.

RICE & MORGAN, for plaintiff in error:

L. E. PARSONS, for defendants.

DARGAN, C. J.—A judgment should show the plaintiff who recovers, the defendant against whom the recovery is had, and the specific thing or amount of money recovered; without these requisites it is no judgment, and no process can issue on it to enforce its satisfaction.—Ordinary v. McLure, 1 Baily, 7; Boykin v. The State, 3 Yerger 426.

A judgment *nisi*, or a conditional judgment, must possess these material requisites, for the final judgment is but a confirmation of the conditional judgment, and cannot differ from the judgment on condition. The conditional judgment must be capable of confimation.—Dickinson v. Walker, 1 Ala. 48.

Tested by these rules there is manifest error. The judgment *ni si* in this case does not show any recovery, or in whose favor it was intended that a recovery should be had. The recitals are: "This day came the parties by their attornies and Solomon Spence being called to come into court and give evidence in behalf of the defendants, came not but made default, and it appearing to the satisfaction of the court that Spence has been duly subpœnaed to appear at this term of the court and give evidence as aforesaid; on motion of defendant's attorney, it is ordered by the court that a forfeiture

of one hundred dollars be entered against said Solomon Spence for such his default, and that the same be made final at the next term of this court, unless said defaulting witness shall then appear and show cause to the contrary." This entry does not show a recovery in favor of any one, and cannot be considered a judgment.

The final judgment, therefore, rendered on this entry, must be reversed.

CHILTON, J., not sitting.

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ABATEMENT.

1. The statute of 1807, which enacts that "no freeholder of this State shall be sued out of the county of his permanent residence," does not apply to suits commenced by attachment.—*Herndon* v. *Givens*, 261

ACCOUNT STATED.

See *Evidence*, 49.

ACTIONS, AND REVIVOR OF.

1. A legatee or distributee of an estate, after a decree in the Orphans' Court, on final settlement, for the sum ascertained to be due him, may maintain an action on the administration bond against the executor or administrator and his sureties.—*Perkins* v. *Moore, Judge, use, &c.* 9
2. Where a bond, or note, given to one as guardian, is sued on in his name, and he dies, the suit should be revived in the name of his administrator, and not in that of the minor, or guardian subsequently appointed.—*Godbold et al.* v. *Megginson, adm'r*, 140
3. S., the endorser on a protested bill of exchange, held by the Branch Bank at Decatur, procured a discount of his note with a view of paying the bill, but having given no direction as to the application of the proceeds, they were placed to his credit on the books of the Bank, and some time afterwards applied by the cashier to the payment of the note, which was thereupon cancelled and delivered over to S. *Held*—That, in the absence of other proof, the note must be considered as extinguished, and no action can be maintained upon it by the Bank.—*Shaw et al.* v. *The Br. Bank at Decatur*, 708
4. A proceeding by *supersedeas* to arrest and have entry of satisfaction of an execution, is a suit between the parties to the judgment, and the pleadings must be made up in their names. A stranger to the record, though he be the assignee of the judgment, cannot be permitted to intervene and tender an issue in his own name.—*Edwards* v. *Lewis*, 813

See *Assumpsit*, 1.
Consideration, 1, 2, 3.
Parties to Actions, 1, 2.

ADVERSE POSSESSION.

1. Where the possession of property is acquired and held for a time in

ADVERSE POSSESSION—CONTINUED.

subordination to the title of another, to render it adverse, there must be a disclaimer of the original title and an actual hostile possession of which the true owner had notice, or which is so ostensible and notorious as to furnish a reasonable or *prima facie* presumption of notice. —*Harrison* v. *Pool*, 167

2. An adverse possession of personal property for more than six years gives a complete title, without reference to the intention or understanding of either or both of the parties at the time of its delivery. *Ib.*
3. The possession of one who claims title under a mortgagor is not adverse to the mortgagee, or those who derive title from him.—*Herbert* v. *Hanrick*, 581
4. Whether a possession is in fact adverse is a question for the jury, and where there is any evidence from which the jury may infer it, an appellate court cannot undertake to say that an erroneous charge touching such possession has worked no injury on the ground of the failure of the proof to make out the possession adverse. *Ib.*
5. Adverse possession to avoid the deed of a disseisee need not be founded on colour of title: a *bona fide* claim of title, asserted in a manner so notorious and distinct as to charge the vendor with notice, is all that is necessary. *Ib.*

ALIMONY.

See *Chancery*, 14.

AMENDMENT.

1. A judgment upon an indictment for a nuisance, "that the nuisance be abated forthwith, at the costs of the defendant, and the sheriff is charged with the execution of this order," is in effect a command to the sheriff to abate the nuisance, and to that extent erroneous, but will be amended in the appellate court, so as to command the defendant to abate the same, if it has not been already done.—*Campbell* v. *The State*, 144
2. Where the verdict in a claim suit finds the issue generally in favor of the plaintiff, a judgment condemning the *interest* of one defendant in execution only is variant from the verdict and erroneous, but the error is one which does not require the cause to be remanded, and will consequently be here corrected at the cost of the plaintiff in error.—*Windham* v *Clarke et al.* 659

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APPEALS AND CERTIORARI.

1. On the trial of an appeal from a justice of the peace, the appellate court, being required by statute to try the case *de novo*, and to give judgment according to its justice and equity, &c., should, in a case where the plaintiff could maintain trespass or assumpsit, disregard the form of the warrant designating the proceeding as an action of debt. —*Catterlin* v. *Spinks*, 467

ARBITRATION.

1. It is competent for an executor or administrator to submit to arbitration a controversy in which the estate is concerned.—*Jones, adm'r*, v. *Deyer and Wife*, 221

ASSIGNMENTS.

1. An assignment by an insolvent debtor for the benefit of creditors, which, after empowering the trustee to expose the property to sale on the best terms practicable, either at private sale or public auction, for cash or on credit, as shall in his opinion most comport with the interest of all parties concerned, requires him, if the property is not sold within six months, to sell it at public auction, &c., is not rendered fraudulent on its face by a provision that the debtor shall retain possession of certain of the property conveyed until a favorable opportunity for the sale of it shall offer—such possession being expressly limited to the time for the sale at public auction.—*Abercrombie* v. *Bradford*, 560
2. That a trustee is authorised to sell for cash or on credit, as shall in his opinion most comport with the interest of all parties concerned, is not sufficient to affect the validity of a deed of assignment for the benefit of creditors. *Ib.*
3. Where the trustee by a deed of assignment is given the discretionary power to sell whenever he thinks proper, either at private or public sale, a provision that the assignor shall retain possession of the chattels conveyed, until a favorable opportunity for the sale of them shall offer, does not impair the right of the trustee to reduce them to his immediate possession, or to maintain trover against one who converts them. *Ib.*
4. The assent of creditors will be presumed to a deed of assignment, which appropriates the property conveyed absolutely and unconditionally to the payment of their debts. *Ib.*
5. Where a deed of assignment is not fraudulent on its face, the possession and use of the property by the assignor, in conformity with the express provisions of the deed, cannot render it void. *Ib.*
6. The fraudulent intent of the grantor alone will not avoid a deed of assignment for the benefit of creditors. *Ib.*

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ASSUMPSIT.

1. The satisfaction of a judgment by a third person, if sanctioned and adopted by the defendant, will ordinarily support a promise to refund. In such case, the fact of ratification warrants the implication of a previous request.—*Kenan* v. *Holloway*, 53
2. An acknowledgment by K. to a stranger, that she owes H., for money which he had voluntarily paid for her, without a previous request, and that she is in honor bound to reimburse him, and intends to do so, is not a promise to H. to refund him the money so paid. *Ib.*
3. Assumpsit for use and occupation will lie against one who takes possession of vacant land, admitting that he has no title, and expressing

ASSUMPSIT—CONTINUED.

a willingness to pay rent to the rightful owner; but possession by a naked trespasser is not of itself sufficient to sustain the action. (Davidson v. Ernest, 7 Ala. 817, commented on and approved.)—*Executors of Smith* v. *Houston*, 111

4. A plaintiff in assumpsit for use and occupation cannot recover rent, that has accrued before the execution and delivery of the deed under which he claims title. *Ib.*

5. Assumpsit for use and occupation will lie against a naked trespasser on real estate, in favor of a lessee who elects to waive the trespass and permits the trespasser to retain possession until the expiration of his term.—*Catterlin* v. *Spinks*, 467

See *Consideration*, 1, 2.

ATTACHMENT.

See *Damages*, 4, 5.

BAILOR AND BAILEE.

1. A bailee of slaves, who recognises the title of the owners, *two of whom are infants*, and, acting in good faith, keeps them subject to delivery whenever legally demanded, but who, in consequence of instructions from the guardian of the infants, refuses to deliver them to the other joint owners, without his authority, is not chargeable in equity with what the slaves would have hired for, but only with the actual value of their services, after deducting the expenses of their food and clothing.—*Leach & Wife* v. *West et als.* 250

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BASTARDY—PROCEEDINGS IN.

1. Where the defendant in a bastardy proceeding appears before the County Court, pleads guilty to the accusation, and acknowledges himself to be the father of the child, and, in pursuance of the judgment rendered, executes a bond, which recites that the mother is a single woman, and was delivered of the child in the county wherein the proceedings were had, the jurisdiction of the court is sufficiently shown, and it is then too late to object to defects in the original complaint, or in the process of the justice of the peace.—*Pruitt* v. *The Judge of the County Court, &c.* 705

2. The correct construction of the bastardy act is not that the father shall be compelled to support the child until it arrives at the age of ten years, but for ten years from the judgment of condemnation. *Ib.*

BILLS OF EXCHEQUER AND PROMISSORY NOTES.

1. It is no defence to an action on a promissory note, that a part of its consideration consisted of a sum of money, advanced by one of the

BILLS OF EXCHEQUER, &c.—CONTINUED.

payees to a third person, at the request of the maker, in payment of an illegal wager, which such third person had won from the maker.—*White* v. *Yarbrough*, 109

2. A bankrupt, who, after his discharge, becomes the *bona fide* holder of a note payable to himself, which had been returned in his schedule and sold by the assignee, is remitted to his original title, and may transfer it by endorsement, so as to vest the right of action in his endorsee.—*Birch* v. *Tillotson*, 387

3. Where an endorser of a negotiable note has received from the maker effects of sufficient value to discharge it, and in consideration thereof promises to pay it, proof of demand and notice is not necessary to charge him, whether the promise was made before or after the maturity of the note.—*Cockrill's Adm'r* v. *Hobson, use, &c.* 391

4. Where one, who is not a *bona fide* holder, acquires a bill of exchange from the acceptor, he takes it in respect to the other parties to the bill, subject to any defence which they could set up against the party from whom he received it.—*Carlisle* v. *Hill*, 398

5. Waiver of notice of non-payment by the drawer of a bill cannot be implied from his receiving of the acceptor, after he has been discharged for want of notice, ample indemnity against his *general liabilities* for him. *Ib.*

6. If ample indemnity against his liability on a bill is received by the drawer from the acceptor, notice of non-payment is not necessary to bind him, but a partial indemnity is insufficient to excuse want of notice. *Ib.*

7. S. H. G. and C. J. G., in exchange for the bonds, payable at a future day, of The Ala. L. Ins. & Tr. Co.—a corporation whose charter does not authorise it to lend its credits—executed to the company their individual bond, secured by mortgage, which they afterwards took up by transfering to the company the notes of E. given to them for land. E., before the transfer of his notes, had made a payment on one of them, which S. H. G. and C. J. G. neglected to enter, and in consideration thereof, they gave him their note for the amount of the payment, which he transfered to the company in part discharge of his notes, and which was subsequently taken up by S. H. G.'s substitution of his own note therefor, payable to the company: *Held*—That the note of S. H. G. is not vitiated by the invalidity of the original contract between him and C. J G. and the company, but is founded on a sufficient consideration.—*Gee* v. *The Ala. Life Ins. & Trust Co.* 637

8. In an action by the holder against the endorser of a note, not negotiable, the insolvency of the maker is not a sufficient excuse for failing to procure a return of no property on an execution against him.—*Bishop* v. *Bradford*, 769

See *Actions, &c.* 3.
Gift, 2.
Usury, 1.
Witness, 8.

BONDS.

See *Actions, &c.* 1.
Parties to Actions, 1.

CASE—ACTION ON.

1. In an action on the case by the vendee against the vendor of land, to recover damages for falsely representing that the tract embraced a certain designated portion of good land, whereby the vendee was induced to make the purchase, it is not necessary to prove that the vendor knew that the representation was false at the time he made it.—*Munroe* v. *Pritchett*, 785

CHANCERY.

1. J. C. C., by his will, directs his executors to retain the sum of two thousand dollars in their hands, for the purpose of building a house for his daughter Caroline, the wife of P. L. L., and *her children* (of whom she has four), at such time and place as they may all agree upon. P. L. L., in anticipation of the action of the executors, has a house erected on his own premises, worth two thousand dollars, and afterwards, in conjunction with his wife, files a bill against the executors, alleging the erection by him of the house, and asking that the executors be decreed to pay over to them the two thousand dollars:—*Held*, that the bill is wanting in equity, and should have been dismissed.—*Cook & Mitchell, ex'rs, &c.* v. *Lewis & Wife*, 67
2. Before the equitable estate of the wife is reduced to possession by her husband, a Court of Chancery will, he being insolvent, entertain jurisdiction of a bill filed by her for a settlement.—*Guild* v. *Guild et als.* 121
3. The decrees of a Court of Chancery acting *in personam*, not *in rem*, if the husband is within the jurisdiction, it is no objection to the exercise of its powers as to him, that the equitable estate of the wife, out of which she seeks a settlement, is within a foreign jurisdiction. *Ib.*
4. To enable the remainder man to demand security of him who has the present interest in a chattel, it is necessary that he should show that the chattel is in danger of waste or deterioration, or that it will be removed from the country, and his ability to obtain the possession, when the first estate determines, thereby rendered uncertain.—*Nance et als.* v. *Coxe*, 125
5. A bill by remainder men for security, which alleges that the property may be scattered, or that the defendant may remove it from the State, and the complainants have no security for its delivery, when their right to possession accrues, is insufficient to authorise the interposition of a Court of Equity. *Ib.*
6. A vendee of land, who has re-sold it with covenant of warranty, and delivered up the possession, if the deed from the original vendor is lost, may apply to a Court of Chancery to compel the widow and heirs of the vendor to supply the loss, by a re-conveyance, without waiting until the heirs assert title to the land.—*Owen et al.* v. *Paul*, 130
7. An alienee of a deceased husband may resort to a Court of Equity to

CHANCERY—CONTINUED.

have dower in the premises allotted to the widow.—*Doe ex dem. Shelton* v. *Carrol et als.* 148

8. G., under a levy made before the expiration of his term of office as sheriff, and S. his successor, under subsequent levies of other executions, sold the lands of the defendant, of which M. became the purchaser at the sale made by G., and B. at that made by S. B. paid no money on his bid, but received a deed for the lands from S. and commenced an action against M. to recover possession: M. and B. compromised the suit by B. executing to M. a quit-claim to the land, and by M. confessing a judgment to B. for the amount of his bid at the sale made by S., with the understanding that this judgment was not to be enforced unless S. should be compelled to pay the amount of the bid to some creditor whose execution was in the hands of S. at the time of the sale, and should call on B. for reimbursement: M. then procured an assignment to himself of the only operative judgment and execution which could claim the money arising from said sale; and B. afterwards settled with S. the amount of the bid, by delivering up to him evidences of debt which he held against him, and caused execution to be issued on the judgment confessed by M. and levied on his property.—*Held*—That on this state of facts a Court of Equity has jurisdiction of a bill filed by M. to restrain B. from enforcing said judgment; and that the answer of B. to such a bill, which merely denies that the judgment was confessed "upon the distirct agreement" alleged, is insufficient to authorise a dissolution of the injunction.—*Moore* v. *Barclay et al.* 158

9. By the statute of 5th February 1846, a simple contract creditor is authorised to go into equity to subject the estate of his non-resident debtor, whether it be of a legal or equitable nature, to the payment of his demand; and where the interest sought to be condemned is an equitable fund in the hands of a trustee, it is no objection to the bill that, instead of the process of attachment, it prays an injunction against the trustee, restraining him from paying over such fund to the debtor.—*Hartley et al.* v. *Bloodgood*, 233

10. Where it is manifestly for the interest of an infant, a Court of Chancery will authorise a sale of its real estate; but before it will do so, the facts which render the sale necessary must be alleged and proven, that the Chancellor may clearly see that the interest of the infant will be thereby promoted.—*Exparte Jewett*, 409

11. The removal of the trustee and infant beyond the limits of the State is not in itself sufficient to induce a Court of Chancery to order a sale of the real estate of the infant. *Ib.*

12. If tenants in common agree that one of them shall occupy the joint estate, and pay to the other a stipulated rent for one half the land he cultivates, a court of law is competent to afford full redress for a breach of the contract.—*Lockard* v. *Lockard*, 423

13. A bill, which alleges that the complainant informed the defendant that he should pay him five dollars per acre for one half the number of acres he might cultivate, that he understood the defendant to assent to it, and that he had instituted a suit at law against the defendant for

CHANCERY—CONTINUED.

the rent, in which he had failed for want of proof, shews on its face that the remedy at law is complete, and that a court of chancery has no jurisdiction. *Ib*

14. A court of chancery will not interfere with a judgment at law, unless some special ground for relief is shown. *Ib.*

15. Where a husband abandons his wife without just cause, and casts her upon society destitute of the means of subsistence, a Court of Chancery, as an original ground of equity, will entertain a bill filed against him for alimony.—*Glover* v. *Glover* 440

16. The Chancery Courts of this State have no jurisdiction of a bill filed against a non-resident defendant, unless "the ground or cause of action, or transaction," on which the bill is founded, occurred within its limits. *Ib.*

17. Where a wife is the sole distributee of an estate, and the husband pays all the debts and takes possession of the assets without administration, claiming them as his absolute property by virtue of his marital rights, although the legal title is not thereby vested in him, yet he acquires such an equitable interest in the property as a Court of Chancery will protect as against those who, after the death of the wife, may seek distribution thereof as the next surviving kin of the intestate.—*Vanderveer* v. *Alston et als.* 494

18. Where a vendee retains possession of the land, a Court of Equity will not rescind the contract, unless there be some special ground for its interposition—such as the vendor's inability to make title, coupled with his insolvency, or fraud in the sale.—*Parks* v. *Brooks*, 529

19. A Court of Equity will not rescind a contract, where the vendor, although unable to make title, is perfectly solvent, and has been guilty of no fraud, on the ground that he is a resident of another State, when it is shown that he was such at the time of the contract, and has so continued ever since. *Ib.*

20. A creditor of an estate must exhaust all his legal remedies against the personal representative and his sureties, if solvent, before he can resort to a Court of Equity to subject the effects, which have passed into the hands of the distributees, to the payment of his demand.—*Ledyard & Hitchcock* v. *Johnston et als.* 548

21. Where the creditor has failed to exhaust his legal remedies against the personal representative and his sureties, the circumstance that he filed his claim with the Judge of the Orphans' Court, who promised to give him notice of any objection that might be made to it and to defer the final settlement of the estate until he could have an opportunity to establish it, but who neglected to do either, cannot aid the jurisdiction of equity to subject the effects which have passed into the hands of the distributees. *Ib.*

22. A party to a deed or other instrument, who alleges a mistake in drawing it, must become an actor in seeking to reform it; until reformed, it is the highest evidence of the contract, and cannot be contradicted or varied by parol proof.—*Hogan et als.* v. *Smith et als.* 600

CHANCERY—CONTINUED.

23. Where all the effects of a trust estate have been converted into money, and the debt constituting a charge upon it ascertained, the decree against the trustee, who is himself a creditor, should be for the balance that remains, after deducting the dividend to which he is entitled, and not for the entire sum found in his hands.—*Harrison, adm'r, et al.* v. *Mock et als.* 617

24. A court of equity acts *in personam*, and, when it has jurisdiction of the person, will afford relief against fraud, notwithstanding the property, in reference to which the fraud has been committed, is without the jurisdiction. In such case, the relief will be adapted to its equity and justice, and if the fraudulent grantee refuses to return the property, he may be charged with its value.—*Stapler et al.* v. *Hurt's Ex'rs*, 799

See *Costs*, 7.

Multifariousness, 1, 2.

CHANCERY—PLEADING AND PRACTICE IN.

1. The general rule is, that a demurrer for multifariousness, like a demurrer for a misjoinder at law, goes to the whole suit, and if sustained, the bill should be dismissed, and not made the ground of partial relief. —*McIntosh et al.* v. *Alexander et als.* 87

2. If there be cases in which an amendment should be allowed, after a demurrer for multifariousness is sustained to a bill, the application to amend must be made in the court below. *Ib.*

3. An averment in a bill, filed by a vendee to establish a lost deed, that he had caused search to be made "in all such places as he supposed it might possibly be found," is sufficient, without alleging that he had searched for it among his own papers.—*Owen et al.* v. *Paul*, 130

4. Where a bill to establish a lost deed alleges, that the then wife of the vendor had therein relinquished her right of dower, the allegation not being admitted, no decree can be made barring her dower, without proof of a substantial compliance with the requirements of the law in existence at the time as to the mode in which *femes covert* should relinquish their dower interests. —*Ib.* 131

5. H. and F. filed a bill to foreclose a mortgage, executed to them by D. to secure the payment of two notes, given for certain plates and maps which H. and D. had agreed to deliver to him at Mobile: The contract not having been complied with by H. and D., the chancellor was of the opinion that the complainants were not entitled to the relief prayed, but, the several parties having avered in their pleadings a willingness to perform, he decreed that H. and D. should deposit the plates and maps with the Register within six months, and in case of default therein, that the bill be dismissed, and that D. should pay into the hands of the Register the amount due on the notes, and in case of default therein, that the mortgage be foreclosed. Before the expiration of the six months, H. and D. shipped the plates and maps to B. at Mobile, to be delivered in compliance with the decree: B. met the Register, who passed the greater part of the six months out of Mobile, in the street, and informed him that he had the plates and maps for

CHANCERY—PLEADING AND PRACTICE IN—CONTINUED.

him, and was requested by the Register to let them remain in his store until he wanted them, when he would send for them, in consequence of which they were not deposited in the Register's office until six weeks after the expiration of the time limited by the decree. *Held:*

I. That performance within the period specified by the decree is to be considered in the nature of a contract, of which time is a material part.

II. That, although time is a material part of the contract, and a failure to perform within the period prescribed, if the default is the result of mere neglect, leaves the party without remedy, yet if a sufficient excuse can be shown for it, and no injury appears to have resulted therefrom to the other party, the court should not withhold its aid.

III. That the circumstances of this case afford a sufficient excuse for the default of H. and D.—*Delage et al.* v. *Hazard et als.* 196

6. Where a creditor seeks to subject to the payment of his demand the unascertained share of one of several distributees of an estate in the hands of the administrator, all the distributees are necessary parties to the bill.—*Hartley et al.* v. *Bloodgood*, 233

7. Where the record does not contain the evidence on which a decree *pro confesso* against a non-resident defendant was rendered, a mere statement in the decree, that the publication was made in due form, is insufficient to sustain it. *Ib.*

8. Where a decree *pro confesso* has been regularly rendered against a defendant, it is not necessary to prove the existence and execution of a promissory note, which the bill alleges was made by him, as against a mere trustee in possession of the fund sought to be subjected to its payment. *Ib.*

9. A defendant need not demur to a bill that is wanting in equity, but may, at any time, reach the defect by motion to dismiss.—*Lockard* v. *Lockard*, 423

10. When the motion to dismiss, for want of equity, is made at the hearing, no previous notice to the complainant is requisite. *Ib.*

11. A bill, wanting in equity, can derive no aid from the answer, and is liable to be dismissed on motion, at any time, although the answer may disclose a case that would entitle the complainant to relief.

12. The allegations of a bill are to be construed most strongly against the complainant. *Ib.*

13. If a complainant neglects, for more than five years, to adopt those measures necessary to bring the defendant properly before the court, it is not error in the chancellor to dismiss his bill.—*Hodges* v. *Wise & Wife et als.* 509

14. Neither the English practice of setting down a cause for hearing at the next term after publication, and issuing a subpœna *ad audiendum judicium*, nor that of speeding causes, has ever been adopted in this State. *Ib.*

15. Where a parent and child are both made parties defendant to a bill, the mere service of subpœna on the parent is insufficient to bring the

CHANCERY—PLEADING AND PRACTICE IN—CONTINUED.
infant before the court. It should specially appear by the officer's return that a subpœna was served on the *parent for the infant.* *Ib*
16. A guardian *ad litem* cannot be appointed for an infant defendant, until the infant has been properly brought before the court, in one of the modes prescribed by our rules of practice. Such appointment, made before the infant is thus brought in, is entirely nugatory. *Ib.*
17. Where the allegations of a bill authorise any decree whatever against a defendant, who is in contempt, it is error in the chancellor to dismiss it as to him.—*Hogan et als.* v. *Smith et als.* 600
18. Where a chancery cause is reversed and remanded by this court for further proceedings, and, upon its return to the court below, a general reference of the matters of account is made by the chancellor, the register is not concluded by his previous report, but may state the account anew, and rectify any mistake that may have intervened in the taking of the first account.—*Harrison, adm'r, et al.* v. *Mock,* 616
19. R. B. H., the trustee in a deed for the benefit of creditors, without distinction or preference, in answer to a bill filed to enforce the trust, sets up demands to a specific amount as due to him by the grantor at the time of the execution of the deed; after the death of R. B. H., the bill is revived against his administrator, who adopts the answer of his intestate, but subsequently files a supplemental answer, insisting upon an additional claim, to which he alleges his intestate's estate is entitled for money advanced and paid out by his intestate, *since* the execution of the deed and filing of his answer, on executions against the grantor, which created a lien superior to the deed of trust: *Held*—1st. That payments on executions against the grantor, made by the trustee *before* the date of the deed, are not put in issue by the pleadings, and are properly disallowed. 2. That the answer of the trustee is an admission of the extent of the debt claimed by him at that time, and is conclusive until amended. *Ib.*
20. Where, in a bill filed against the administrator with the will annexed of an estate, the complainant asserts title to the undivided interest of one of several legatees, two of whom are dead, in the absence of an allegation that the deceased legatees were free from debt, he cannot proceed without amending his bill, so as to bring in their personal representatives.—*Goodman, ex'r,* v. *Benham, adm'r,* 625
21. The chancellor may *mere motu* notice a defect of parties to a bill at the hearing, and order it to stand over on leave to amend, or dismiss it without prejudice. *Ib.*
22. Where the chancellor proposes to the complainant in a bill, which is defective for the want of the necessary parties, to amend it, and he refuses to do so, it is not error to dismiss it. *Ib.*
23. An execution for costs cannot issue against the next friend of the complainant in a chancery suit, upon the return of "no property" on an execution against the defendant, without the previous order of the chancellor—*Gray* v. *Gray, by next friend,* 649
24. Does the statute (Clay's Dig. 316, § 23,) authorising the clerks of the

CHANCERY—PLEADING AND PRACTICE IN—CONTINUED.

several Circuit and County Courts, &c., upon the return of no property on an execution against the defendant, to issue execution against the plaintiff for the costs, &c., apply to Courts of Chancery?—QUERE. *Ib.*

25. A decree is final which settles the rights of the parties, notwithstanding a reference is ordered; and such decree cannot be altered or amended except in matter of form or clerical misprision, unless it be done by consent, or upon a re-hearing granted, or on bill of review, or bill in the nature of a bill of review.—*Ansley & Wife* v. *Robinson & Wife et als.* 793
26. Courts of equity in this State are courts of record, and decrees, like judgments at law, are considered matters of record, and deemed enrolled as of the term when rendered. *Ib*
27. A decree cannot embrace matters not charged in the bill, although warranted by the proof, or the admissions of the defendant. *Ib.*
28. When a reference is ordered to ascertain the amount of money due the complainant, or the value of property with which the defendant is charged by the decree, no execution should issue, until the report of the register comes in and is confirmed.—*Stapler et al.* v. *Hurt's Ex'rs,* 799
29. A creditor's bill, praying a writ of *ne exeat*, having been filed against S., as the fraudulent grantee of property, which he had removed from the State, he was arrested, and gave bond with security, conditioned to abide by and perform the final decree: *Held*—That it is error in the chancellor to order execution to issue against the securities for the value of the property, before they have had an opportunity to contest their liability on the bond. *Ib.*

CLAIMS UNDER TREATIES AND ACTS OF CONGRESS.

1. If the *second* proviso to the *third* section of the act of Congress of the 8th May 1832, "supplementary to the several acts for adjusting the claims to land and establishing land offices in the District east of the Island of New Orleans," be regarded as a limtation upon the provisions of that section, a donation claimant can take nothing under it, until the quantity of land to which he asserts a right has been first ascertained.—*Doe ex dem. Kennedy's Ex'rs* v. *Townsley's Heirs,* 239
2. To invest a donation claimant, under the act of Congress of the 8th May 1832, with a title to his settlement, it is necessary that the land should have been surveyed, and its location and quantity ascertained, as provided in the *fourth* section of the act. *Ib.*

CLERK AND HIS DEPUTIES.

1. The collection by the deputy of money, which the clerk of the court is authorised to receive, is in legal contemplation a collection by the clerk himself, and he is liable accordingly.—*Tucker* v. *The State,* 670

CONSIDERATION.

1. A voluntary payment of money by one person for the use of another, without a previous request, will not support a subsequent promise to

CONSIDERATION—CONTINUED.

refund, unless the payment is beneficial to the promissor.—*Kenan* v. *Holloway*, 53

2. The satisfaction of a judgment by a third person, if sanctioned and adopted by the defendant, will ordinarily support a promise to refund. In such case, the fact of ratification warrants the implication of a previous request. *Ib.*

3. A promise, made undersuch c ircumstances as show an ignorance, on the part of the promissor, that the demand, promised to be paid, creates no legal liability, is without consideration and void. *Ib.*

4. S. H. G. and C. J. G., in exchange for the bonds, payable at a future day, of The Ala. L. Ins. & Tr. Co.—a corporation whose charter does not authorise it to lend its credits—executed to the company their individual bond, secured by mortgage, which they afterwards took up by transfering to the company the notes of E. given to them for land. E., before the transfer of his notes, had made a payment on one of them, which S. H. G. and C. J. G. neglected to enter, and in consideration thereof, they gave him their note for the amount of the payment, which he transfered to the company in part discharge of his notes, and which was subsequently taken up by S. H. G.'s substitution of his own note therefor, payable to the company: *Held*—That the note of S. H. G. is not vitiated by the invalidity of the original contract between him and C. J G. and the company, but is founded on a sufficient consideration.—*Gee* v. *The Ala. Life Ins. & Trust Co.* 637

See *Bills of Exchange, &c.* 1.
Contracts, &c. 3.
Evidence, 26, 51.
Frauds, Statute of, 1.
Marriage, &c. 1.
Principal and Sureties, 5.

CONSTITUTIONAL LAW.

1. Where the judgment of conviction on an indictment for murder is reversed, because of the insufficiency of the verdict to support it, the prisoner may be tried again, without violating the 13th section of the 1st article of the constitution.—*Cobia* v. *The State*, 781

CONTRACT AND AGREEMENT.

1. H. and F. filed a bill to foreclose a mortgage, executed to them by D. to secure the payment of two notes, given for certain plates and maps which H. and D. had agreed to deliver to him at Mobile: The contract not having been complied with by H. and D., the chancellor was of the opinion that the complainants were not entitled to the relief prayed, but, the several parties having avered in their pleadings a willingness to perform, he decreed that H. and D. should deposit the plates and maps with the Register within six months, and in case of default therein, that the bill be dismissed, and that D. should pay into the hands of the Register the amount due on the notes, and in case of

CONTRACT AND AGREEMENT—CONTINUED.

default therein, that the mortgage be foreclosed. Before the expiration of the six months, H. and D. shipped the plates and maps to B. at Mobile, to be delivered in compliance with the decree: B. met the Register, who passed the greater part of the six months out of Mobile, in the street, and informed him that he had the plates and maps for him, and was requested by the Register to let them remain in his store until he wanted them, when he would send for them, in consequence of which they were not deposited in the Register's office until six weeks after the expiration of the time limited by the decree. *Held:*

I. That performance within the period specified by the decree is to be considered in the nature of a contract, of which time is a material part.

II. That, although time is a material part of the contract, and a failure to perform within the period prescribed, if the default is the result of mere neglect, leaves the party without remedy, yet if a sufficient excuse can be shown for it, and no injury appears to have resulted therefrom to the other party, the court should not withhold its aid.

III. That the circumstances of this case afford a sufficient excuse for the default of H. and D.—*Delage et al.* v. *Hazard et als.* 196

2. Where a father by deed conveys a life estate in slaves to his son, with remainder to his brothers and sisters should he die without children, and the son afterwards exchanges one of the slaves with his father for another, refusing at the same time to receive the slave exchanged for subject to the limitations of the deed, but requiring therefor an absolute deed from his father with covenant of warranty, the slave so exchanged for cannot be considered as substituted for the one embraced in the former deed.—*Leach & Wife* v. *West et als.* 250

3. H. executes to B. his bond, on the face of which no consideration is expressed, conditioned to make him a quit-claim deed to certain lots of land in two years: on the same day, H. and B., who had for some time before been partners in the mercantile business, enter into an agreement, by which B. covenants to use his best endeavors for the term of two years to collect the debts due the firm, and to pay the debts due it. *Held*—

I. That under our statute the bond imports a consideration.

II. That no reference being made in either instrument to the other, and the subject matter of each being entirely different, it cannot be intended that they are parts of one and the same transaction, and the covenant of B. the consideration of the bond.—*Doe ex dem. Holman et al.* v. *Crane et al.* 570

4. A. and D. entered into a verbal contract, by which A. undertook to sell and deliver to D., at a certain time and place, fifty bales of cotton, and D. to pay him therefor ten cents per pound. About the time fixed on for the fulfillment of the contract, the parties agreed that the time of performance should be postponed to another named day, and that their contract should be reduced to writing, which, however, was never done. On the day last appointed, D. and the agent of A. met at the place designated for the delivery, when D. took the agent aside and said to him that A. ought to let

CONTRACT AND AGREEMENT—CONTINUED.

him off from the contract, but the agent proceeded to tender him the cotton, which he refused to accept and pay for: *Held*—That in an action by A. for a breach of the contract, *the question*, whether the parties intended by the second agreement that the contract should be no longer binding, unless reduced to writing, or whether they intended merely that it should be reduced to writing, with the view of being mutually furnished with more certain evidence of what the contract was, is one of fact, and should be left to the determination of the jury.—*Adams* v. *Davis*, 748

See *Infant and Infancy*, 1.

CONTRIBUTION.

See *Principal and Surety*, 1, 2, 4, 5, 6.

CORPORATION.

1. The charter of a corporation cannot be declared void in a collateral proceeding, and evidence of fraud in the procurement of the charter is therefore inadmissible in a suit by the corporation against an individual.—*Duke* v. *The Cahawba Navigation Co.* 372
2. The 13th section of the act incorporating the *Cahawba Navigation Company*, which suspends the right to collect toll upon report to the Governor, &c. that the river is not in the condition contemplated by the act, does not, on such report being made, divest the company of its corporate character, nor of its right to sue for and recover toll due to it, prior to the making of the report. *Ib.*
3. It is not indispensable to the right of said company to demand toll, under those sections of the act which authorise its collection upon the Governor's making certificate, &c., that the company should give either actual or constructive notice that such certificate had been obtained. *Ib.*
4. Nor is it imperative on the company to make a personal demand of toll, prior to the institution of a suit for its recovery. *Ib.*

COSTS.

1. Where, upon final settlement of an estate, a contest arises between the administrator and distributees, as to whether a particular fund is assets of the estate or belongs to the administrator individually, and a decision is made in favor of the distributees, the administrator is personally liable for the costs of the proceeding.——*Jones, adm'r*, v. *Deyer and Wife*, 221
2. If distributees except to the administrator's account, and seek to charge him beyond the amount with which the administrator has debited himself, but fail to produce any evidence in support of the exception, it is proper to charge them with the costs consequent thereon. *Ib.*
3. A guardian is bound to use ordinary prudence and diligence in managing the estate of his ward, and if he brings suits in the ward's name, where no cause of action exists, he is personally chargeable with the

COSTS—CONTINUED.

costs, although he may have acted under the advice of counsel.—*Savage, guardian &c.* v. *Dickson*, 257

4. A guardian should ascertain the facts of the case, before he brings suit for his ward, and if he *heedlessly* sues on a supposed state of facts, which in truth does not exist, he is personally liable for the costs incurred. *Ib.*

5. An execution for costs cannot issue against the next friend of the complainant in a chancery suit, upon the return of "no property" on an execution against the defendant, without the previous order of the chancellor.—*Gray v. Gray, by next friend, &c.* 649

6. Does the statute (Clay's Dig. 316, § 23,) authorising the clerks of the several Circuit and County Courts, &c., upon the return of no property on an execution against the defendant, to issue execution against the plaintiff for the costs, &c., apply to Courts of Chancery?—QUERE. *Ib.*

7. But one tax fee can be allowed in a chancery suit, however numerous the parties, or distinct their interests.—*Lee, Sills et al.* v. *Smyley*, 773

COURT, CHARGE OF.

1. Where the *mere tendency* of a charge is to mislead the jury, the party, to be prejudiced by it, should ask additional and explanatory instructions; but where its *necessary effect* is to produce that result, the charge is fatally erroneous.—*Kenan* v. *Holloway*, 5

2. A father executes to his daughter, a married woman, a deed of gift for a slave, which does not create a separate estate in the wife, but vests the property absolutely in the husband: The husband, an illiterate man, believing that his marital rights are excluded, after the slave has remained in his possession some two or three months, refuses to let it remain longer; whereupon the wife sends the slave and deed to her father, informing him of the facts and requesting him to do the best he can for her: The father receives possession of both, saying that he would put the slave to work and account to his daughter for it, but died in possession of the slave more than six years thereafter, without a further recognition of the title created by the deed. *Held*—

I. That a charge, which assumes that the after possession of the father was in subordination to the title created by the deed, is erroneous, as withdrawing from the jury the consideration of the *quo animo* the possession was held.

II. That there was no error in refusing to charge that the return of the slave and deed to the father was a revocation of the gift.—*Mims & Mims* v. *Sturdevant*, 154

3. Where the *only* question raised on a deed of trust, by charges asked, is whether it is *voluntary*, or on *valuable consideration*, a charge in lieu of those requested, that if the jury believe from the evidence that certain facts existed, they constituted the *cestui que trust* a *bona fide* creditor, must be construed in reference to the question presented, and cannot be regarded as withdrawing from the jury the consideration

COURT, CHARGE OF—CONTINUED.

of the *motive* which induced its execution.—*Lockwood* v. *Nelson*, 295

4. Where the facts of a case are clear and undisputed, the court may charge directly upon them without hypothesis.—*Williams* v. *Shackelford*, 318

5. In a criminal prosecution, the only legitimate purpose, for which the accused can introduce evidence to show hostile feelings towards him on the part of a witness for the State, is to impeach his credit; and where, after such witness had testified to commissions by the accused of the offence charged at different times, it is proven that he did *a particular act* to entrap the accused, and thereby to procure additional evidence against him, it is not error in the court to refuse to instruct the jury, that "they might consider it as a circumstance tending to show that the witness had no proof before that time that would convict the defendant."—*Rossett* v. *The State*, 362

6. Where the evidence is conflicting, the court commits no error in charging upon it hypothetically.—*Carlisle* v. *Hill*, 398

7. Where there is some evidence in support of the defence set up, a charge, the effect of which is to withdraw the evidence from the consideration of the jury and to determine that it does not sustain the defence, is properly refused. *Ib.*

8. A charge, based on a hypothetical state of facts, directly opposed to the evidence, should not be given. *Ib.*

9. Whether a possession is in fact adverse is a question for the jury, and where there is any evidence from which the jury may infer it, an appellate court cannot undertake to say that an erroneous charge touching such possession has worked no injury on the ground of the failure of the proof to make out the possession adverse.—*Herbert* v. *Hanrick*, 581

10. A party is entitled to have a correct charge given in the words in which it is asked, and the giving of another charge, after its refusal, the same in substance, will not cure the error.—*Phillips* v. *Beene*, 721

11. Where the court gives an *affirmative* charge, which asserts an erroneous legal proposition, the presumption is, in the absence of every thing to exclude it, that there was some evidence on the point, that called for instruction, although none appears in the bill of exceptions — *Ware & Cowles* v. *Dudley*, 742

See *Contract, &c.* 4.
Exceptions, Bill of, 1.

CRIMINAL CASES, AND PROCEEDINGS IN.

1. Mere words do not constitute an affray; nor is a party guilty of that offence, who offers no resistance to an attack made upon him, although the attack is induced by insulting language used by him to the assailant.—*O'Neill* v. *The State*, 65

2. A judgment upon an indictment for a nuisance, "that the nuisance be abated forthwith, at the costs of the defendant, and the sheriff is charged with the execution of this order," is in effect a command to

CRIMINAL CASES, AND PROCEEDINGS IN—CONTINUED.

the sheriff to abate the nuisance, and to that extent erroneous, but will be amended in the appellate court, so as to command the defendant to abate the same, if it has not been already done.—*Campbell* v. *The State*, 144

3. A person, whose business is that of a butcher, but who sells spirituous liquors *once* in a less quantity than a quart, without first procuring license to do so, cannot be regarded as one engaged in the "business or employment" of retailing, and is not subject to the penalty prescribed by the 98th section of the Revenue Act of the 6th March 1848.—*Moore* v. *The State*, 411
4. If a married woman commits a misdemeanor with the concurrence of her husband, the husband is liable to indictment.—*Williamson* v. *The State*, 431
5. On the trial of a criminal prosecution against a clerk of the Circuit Court for collecting, under judgment in favor of the State, and refusing to pay over to the county treasurer money to which he is entitled, within three days after demand, proof that the collection was made in *county claims* will not support the indictment.—*Tucker* v. *The State*, 670
6. In criminal, as well as in civil cases, it is within the discretion of the court, on the application of either party, to require the witnesses to be examined out of the hearing of each other, and its ruling in that respect cannot be assigned as error.—*McLean* v. *The State*, 672
7. The crime of murder being divided by our penal code into two grades, with different punishments, it is necessary on the trial of an indictment for that offence, that the verdict of the jury should ascertain the degree, otherwise no judgment can be pronounced upon it.—*Cobia* v. *The State*, 781

See *Constitutional Law*, 1.
Court, Charge of, 5.
Error, 7.
Evidence, 9, 12, 25, 30, 57, 58, 59.
Indictment, 1, 2, 3.
Witness, 11.

CURTESY, TENANT BY.

1. The Writ of Right at common law, or as recognised by statute in this State, does not lie in favor of a tenant by the curtesy.—*Lecatt* v. *The Merchants' Ins. Co.* 177

DAMAGES.

1. A plaintiff in detinue, whose title to the property sued for is legally divested before the trial of the cause, can recover nothing beyond his damages for its detention to the time of such divestiture, and the costs of the suit.—*Cole, adm'r*, v. *Conolly*, 271
2. If the trustee, in a deed for the benefit of creditors, improperly permits the grantor in his life-time or his administrator after his death to retain possession of the slaves of the trust estate and receive the pro-

DAMAGES—CONTINUED.

ceeds of their labor, without deriving any profit to himself therefrom, the measure of his liability is not the benefit that may have accrued to the grantor or his estate, but the value of the reasonable hire of the slaves.—*Harrison* v. *Mock.* 616

3. L., as sheriff, seized the property of G., and, refusing to surrender it on demand, sold it under executions against H., and, by direction of H., paid over the surplus, left from the sale after satisfying the executions, to G. as his agent: *Held*—That in an action of trover by G. against the executor of L., the surplus, thus paid over, cannot be allowed to go in reduction of damages.—*Locke* v. *Garrett,* 698
4. If an attachment, sued out in a case in which *just* grounds for it exist, is abated, on plea, for a defect in the affidavit, the party against whom it is issued, in a suit upon the bond, is not entitled to recover the *actual* damages he has sustained.—*Sharpe et als.* v. *Hunter,* 765
5. Can *nominal* damages be recovered in such a case?—QUERE. *Ib.*
6. A warranty of soundness is broken, if the property is diseased at the time of the sale, whether the disease be of a permanent character or not, and the vendee is entitled to recover to the extent of the damage he has sustained by the breach.—*Marshall* v. *Wood,* 806
7. In an action for a breach of warranty of soundness in the sale of a slave, the true measure of damages, where the vendee retains the property, and it is of any value, is the difference between its actual value at the time of the sale and the value it would have possessed had it conformed to the warranty—holding the price paid as evidence of the latter—to which the jury may add interest on such difference, and money necessarily paid to a physician in attempting to cure the disease. *Ib.*

DEBT, ACTION OF.

1. Where a statute prescribes a penalty for doing a particular act, to be recovered—one half to the use of the informer and the other half to the use of the party aggrieved—the latter may bring a common action of debt in his own name and recover the whole penalty. In such case, there is no need of resorting to the *qui tam* form of action.—*Lewis* v. *Stein,* 214

DEEDS AND WRITTEN INSTRUMENTS.

1. A sheriff's deed for land, sold under judgment and execution, cannot be collaterally impeached by a stranger, who has no interest in either. —*Executors of Smith* v. *Houston,* 111
2. H. executes to B. his bond, on the face of which no consideration is expressed, conditioned to make him a quit-claim deed to certain lots of land in two years: on the same day, H. and B., who had for some time before been partners in the mercantile business, enter into an agreement, by which B. covenants to use his best endeavors for the term of two years to collect the debts due the firm, and to pay the debts due by it. *Held*—

   I. That under our statute the bond imports a consideration.

DEEDS AND WRITTEN INSTRUMENTS—CONTINUED.

II. That no reference being made in either instrument to the other, and the subject matter of each being entirely different, it cannot be intended that they are parts of one and the same transaction, and the covenant of B. the consideration of the bond.—*Doe ex dem. Holman et al.* v. *Crane et al.* 570

3. Where the meaning of an instrument is to be collected from the writing alone, it is the province of the court to construe it, and to instruct the jury as to its legal effect. *Ib.*

See *Assignments*, 1, 2, 3, 4, 5, 6.
Contracts, &c. 2.
Evidence, 51, 52, 54.
Indian Titles, 1.
Mortgage, 8.
Partners, &c. 2.

DEEDS, REGISTRY OF.

1. An unregistered mortgage is valid and operative against subsequent purchasers, with notice. The fact that the mortgage was executed in another State, whilst the property was in this, cannot affect the principle.—*Dearing* v. *Watkins*, 20

2. If an agent, transcending his authority, sells the slaves of his principal, and the principal ratifies the act, the purchaser is entitled to hold the slavrs as against a prior uuregistered mortgage, of which he had no notice at the time of such ratification.—*Dearing* v. *Lightfoot*, 28

3. The fact that a mortgage on property in this State is executed in another State, does not dispense with the necessity of registration in order to give it validity as against creditors and subsequent purchasers. *Ib.*

4. The proof or acknowledgmont of a deed of mortgage, without reference to the *form* of the probate, is all that is necessary to admit it to record. (Hobson v. Kissam, 8 Ala. 357, re-affirmed.—*Herbert* v. *Hanrick*, 581

DEEDS OF TRUST.

1. The assent of creditors to a deed of trust for their security will be presumed, when no condition is imposed prejudicial to them, or restrictive of their rights.—*Lockwood* v. *Nelson* 295

2. Where a trustee, himself a creditor, accepts from the debtor a deed of trust for the benefit of all his creditors, which provides for their payment "equally and rateably, without any distinction or preference," he thereby agrees to execute the trust according to the provisions of the deed and to share *pro rata* with the other creditors, should the trust effects prove insufficient for the satisfaction of all.—*Harrison, adm'r, et al.* v. *Mock et al.* 616

See *Trustee, &c.* 1, 2, 3, 4.

DEMURRER.

1. If counts in case and trespass be joined, and the defendant demurs to one count only, the demurrer must be overruled. The mis-joinder can be reached alone by demurrer to the declaration.—*Ragsdale* v. *Bowles*, 62

See *Judgment and Decree*, 2.—*Pleading at Law*, 2.

DEPOSITION.

1. The brother-in-law of a party, at whose instance the deposition of a witness is taken, is incompetent to act as commissioner.—*Bryant* v. *Ingraham*, 116
2. A deposition, reduced to writing by a brother of the party for whose benefit it is taken, should be suppressed on motion of the opposite party. *Ib.*
3. A deposition taken irregularly and not in conformity with the requirements of law, is inadmissible as testimony, and may be excluded on motion, at the trial of the cause. (The distinction drawn between the cases of Cullum v. Smith et al. 6 Ala. 627, and Steele v. Dart & Co., 6 Ala. 800.) *Ib.*
4. A deposition, taken after the day on which the commission is returnable, is properly excluded from the jury.—*Herndon* v. *Givens*, 262
5. Where the deposition of a witness is taken, when he is incompetent, and his competency is afterwards restored, a second deposition taken whilst the first remains on the file of the court, in which the witness merely states, "that the facts, deposed to in the deposition of his as aforesaid first taken, are true," will not authorise the admission of the first deposition as evidence.—*Scales* v. *Desha, Shepherd & Co.* 308
6. The admission in evidence of a second deposition of the same witness, taken without a previous order, is a matter entirely within the discretion of the primary court, and is not revisable on error.—*Herbert* v. *Hanrick*, 581

DETINUE.

1. Where property is bequeathed in trust "for the maintenance of a married man and his family," the entire interest, as between him and his wife, vests absolutely in the husband, and, there being no children, his administrator, after his death, may recover the possession of the property from the wife in an action of detinue.—*Allen & Wife* v. *White, adm'r*, 181
2. A plaintiff in detinue, whose right to the property sued for is legally divested before the trial of the cause, can recover nothing beyond his damages for its detention to the time of such divestiture, and the costs of the suit.—*Cole, adm'r*, v. *Conolly*, 271
3. Where one, in possession of the property of a third person, surrenders it in obedience to the mandate of a court of competent jurisdiction, issued in a proceeding to which such third person is a party, it is a full defence to a suit brought against him by the latter for the recovery of the property. *Ib.*

See *Evidence*, 3.

DISCOVERY AT LAW.

1. In an action for a tort to to the person, the plaintiff is not entitled to a discovery from the defendant in aid of his action.—*Robinson* v. *Craig*, 50

See *Error*, 3.

DISSEISIN.

See *Adverse Possession.*

DOWER, AND ASSIGNMENT OF.

1. Where a bill to establish a lost deed alleges, that the then wife of the vendor had therein relinquished her right of dower, the allegation not being admitted, no decree can be made barring her dower, without proof of a substantial compliance with the requirements of the law in existence at the time as to the mode in which *femes covert* should relinquish their dower interests.—*Owen et al.* v. *Paul*, 131
2. The widow is entitled under the statute (Clay's Dig. 173, § 7) to retain possession of the dwelling-house in which her husband most usually dwelt next before his death, free from molestation and rent, until dower is assigned her, and may successfully defend an action of ejectment instituted against her by the alienee of the husband.—*Shelton* v. *Carrol et als.* 148
3. Where the widow is in possession of the dwelling-house in which her husband most usually dwelt next before his death, it is not her duty, but the duty of him who is entitled to the fee, to become the actor in procuring the assignment of her dower. *Ib.*
4. The marriage of the widow does not work a forfeiture of her right to retain possession of the dwelling-house in which her husband most usually dwelt next before his death, until dower is assigned her. *Ib.*
5. An alienee of a deceased husband may resort to a Court of Equity to have dower in the premises allotted to the widow. *Ib.*
6. A wife has an inchoate right to dower in land, purchased by her husband from an Indian reservee under the Creek Treaty of 1832, so soon as the contract is approved by the President of the United States.—*Parks* v. *Brooks*, 529
7. An antenuptial agreement, by which the intended wife, in consideration of the settlement of her own estate to her sole and separate use, releases and relinquishes to her expected husband all claim to dower in the lands of which he may be seized during the coverture, is not a bar to a proceeding at law, after his death, for an allotment of her dower.—*Blackmon* v. *Blackmon et als.* 633

EJECTMENT AND TRESPASS TO TRY TITLE.

1. In an action of trespass to try titles, instituted against a mortgagor in possession, the mortgagee, if entitled to the right of entry, may be admitted as a party defendant.—*Noble et al.* v. *Coleman & Gunter*, 77
2. The plaintiff in an action of ejectment or trespass to try title may dismiss the suit whenever he thinks proper, and the fact that the bene-

EJECTMENT, &c.—CONTINUED.

ficial interest in such suit is in another cannot affect his right to do so.—*White* v. *Nance*, 345

3. Where a trustee in a deed, executed for the benefit of creditors, quit-claims to the grantor all his right, title and interest in the trust estate, the latter is thereby re-invested with the legal title, and a subsequent sale of it by the trustee, under the deed, conveys no such title to the purchaser as will sustain an action of trespass to try titles.—*Huckaby* v. *Billingsly*, 414

See *Claims under Treaties, &c.* 1, 2.
Estoppel, 5.
Evidence, 1, 16, 17.
Fraud, 1.

ELECTION.

See *Executors, &c.* 3.

ERROR.

1. A writ of error will not lie on the order of an inferior Court granting a new trial.—*Walker* v. *Hale et al.* 26
2. This Court has no power to revise the action of the Orphans' Court on the *annual* settlement of a guardian's accounts.—*Stewart* v. *Price*,40
3. A writ of error will not lie to revise the action of an inferior court, on an application for the allowance of interrogatories under the statute to a party in the suit.—*Robinson* v. *Craig*, 50
4. A proceeding under the act of 1803 for partition is not such a judgment, sentence or decree, as will sustain a writ of error. *Certiorari* is the only process by which it can be brought under review.—*Heirs of Bryant* v. *Stearns*, 302
5. Where the late husband of a deceased wife propounds his interest and moves the Orphans' Court for a decree against her guardian for a sum of money in his hands, which belonged to his ward, a denial of the motion is such a final order as will support a writ of error.—*McDaniel* v. *Whitman, guardian*, 343
6. If a plaintiff desires to dismiss his suit, but the court notwithstanding proceeds to a trial, whereby the same result is attained that would have been effected by the dismissal, no injury is done to the plaintiff, and the judgment consequently will not be reversed.—*White* v. *Nance*, 345
7. Where points are reserved and certified by the primary court as novel and difficult, this court, in the absence of a writ of error, cannot go beyond the questions presented by the reference and consider others not embraced by it.—*Moore* v. *The State*, 411
8. An error, from which no actual injury results, is not a ground of reversal.—*Ransom, adm'r*, v. *Quarles*, 437
9. The expression of an opinion by the court, during the progress of a cause, which does not appear to have been given as a charge to the ju-

ERROR—CONTINUED.

ry, or intended for their hearing, although erroneous, cannot constitute a ground of reversal.—*Greene* v. *Tims, use &c.* 541

10. Where no question is raised in the primary court, by plea or otherwise, as to the right of a corporation to hold land or maintain an action for its recovery, the objection cannot be made for the first time in this court.—*Henley* v. *Br. Bank at Mobile,* 552

11. The admission in evidence of a second deposition of the same witness, taken without a previous order, is a matter entirely within the discretion of the primary court, and is not revisable on error.—*Herbert* v. *Hanrick,* 581

12. Where no injury to the plaintiff in error could possibly have resulted from the admission of improper evidence, it furnishes no ground of reversal. *Ib.*

13. An irregularity in the entry of the levy on an execution cannot affect the title of the purchaser, and as evidence intended to explain it is immaterial and unnecessary, its admission, though erroneous, cannot avail as a ground of reversal.—*Forrest & Lyon* v. *Camp,* 642

14. When a claimant has appeared and proceeded without objection to a trial of the right of property, he cannot insist for the first time in this court that the suit was discontinued for want of prosecution.—*Windham* v *Clarke et al.* 659

15. Either party in a claim suit has the right before trial to require that the issue be made up, but if they go to trial without doing so, the want of an issue cannot be assigned in this court as error. *Ib.*

16. In criminal, as well as civil cases, it is within the discretion of the court, on the agplication of either party, to require the witnesses to be examined out of the hearing of each other, and its ruling in that respect cannot be assigned as error.—*McLean* v. *The State,* 672

17. An opinion expressed by the court, during the progress of a trial, which does not appear to have been given in charge to the jury, or to have been in any way connected with a refusal to charge, or with the admission or rejection of testimony, cannot be the subject of revision in this court.—*Phillips* v. *Beene,* 720

18. A joint administrator cannot complain that separate judgments are rendered against him and his co-administrator for the assets found in their hands respectively: It is error without injury, and constitutes no ground for reversal.—*Kavanaugh & Wife* v. *Thompvon & Wife et als.* 817

19. Administrators cannot complain that a decree, regular in form, is rendered against them in favor of infant distributees, without the appointment of guardians *ad litem.* *Ib.*

See *Court, Charge of,* 9, 10, 11.
Intendments, &c. 1, 5, 7.
Orphans' Court, 1, 3, 10.

ESTATES OF DECEASED PERSONS.

1. The filing of a certificate of the clerk of the court in which a judgment was rendered against an insolvent estate, substantially describing the

ESTATES, &c.—CONTINUED.
judgment, is a sufficient compliance with the statute requiring claims to be filed, and it is competent for the creditor, after objection is made, to produce a transcript of the record.—*Ransom* v. *Quarles*, 437
2. Where a clerk's certificate, substantially describing a judgment, is filed by a creditor as evidence of his claim against an insolvent estate, the omission to specify the costs is immaterial, as they are merely consequential to the judgment. *Ib.*
3. Creditors of an estate, regularly declared insolvent, who have presented their claims to the administrator within eighteen months after grant of administration, but who have failed to file them with the clerk within six months after the decree of insolvency, are entitled to be paid if the estate should ultimately prove *solvent*, and at the final settlement, should be permitted to show that the administrator is chargeable with assets which he has not accounted for, with a view of establishing the fact of its solvency.—*Middleton's Adm'r et al.* v. *Maull's Adm'r*, 479

See *Costs*, 2.
Execution, Writ of, 2.

ESTATES IN REMAINDER.

1. To enable the remainder man to demand security of him who has the present interest in a chattel, it is necessary that he should show that the chattel is in danger of waste or deterioration, or that it will be removed from the country, and his ability to obtain the possession, when the first estate determines, thereby rendered uncertain.—*Nance et als.* v. *Coxe*, 125

ESTOPPEL.

1. The gratuitous payment of rent by one in possession of real estate does not estop him from showing the true character in which he holds the premises.—*Shelton* v. *Carrol et als.* 148
2. If P. having title to slaves, recognises the right of R. B. H. to dispose of them by will, and upon demand by the personal representative of R. B. H. surrenders them to him, and with actual notice of all the proceedings, stands by and suffers them, without objection on his part, to be divided, under an order of the Orphans' Court, among the distributees of the estate, and carried by them into other States, he is estopped from setting up against such personal representative any claim for or on account of said slaves.—*Harrison* v. *Poole*, 167
3. A tenant is estopped from denying the title of his landlord, and interposing to it an outstanding title, which has never been asserted against him.—*Pope et al.* v. *Harkins et al.* 321
4. A tenant is estopped from setting up against his landlord or those who claim under him a title adverse to that which he acknowledged by his tenancy. If he relies on a title acquired after the term of his landlord expired, he should show or propose to show it in connection with his evidence of title.—*Henley* v. *Br. Bank at Mobile*, 553

ESTOPPEL—CONTINUED.

5. If one, seized in fee of land, induces another to purchase it at execution sale, as the property of a third person, he is not estopped in a court of law from asserting his title against the purchaser. In such case a court of equity alone is competent to afford relief.—*McPherson* v. *Walters*, 714

6. Where a writ in detinue is served on the defendant twenty-four days after its issuance, the execution by him of a replevy bond for the property does not estop him from showing that it was not in his possession at the commencement of the suit.—*Wallis* v. *Long*, 738

EVIDENCE.

1. *Admissibility and Relevancy of.*

1. The fact, that B. is the usee in the suit, does not render a deed, executed by him as sheriff, before the institution of the suit, inadmissible in evidence to shew title in the plaintiff.—*Ex'rs of Smith* v. *Houston, use, &c.* 111

2. When a plaintiff and defendant deduce title from the same person—the one by parol gift, the other under a subsequent will—testimony, tending to establish the insanity of the testator at the time of the execution of the will, is wholly irrelevant and properly rejected—*Bryant* v. *Ingraham*, 117

3. P., who was never married to, but lived with an illegitimate daughter of R. B. H., had charge in South Carolina of certain slaves as his overseer, which he afterwards for fifteen years held possession of in this State, claiming and controlling them as his own. R. B. H. within this time lived in the immediate neighborhood of P., and repeatedly spoke of the slaves as P.'s property, but when about to die executed a will, bequeathing them to P. in trust for the benefit of certain other slaves whom he attempted to manumit. The will, at the drawing up of which P. was present and gave the names of most of the slaves so bequeathed, required that he should, before he assumed the execution of the trust, enter into bond for its faithful performance. After the death of R. B. H. and the probate of the will, K. H., one of the distributees of the estate, was appointed administrator with the will annexed, and demanded the slaves from P. P. surrendered them to him, and he kept them for two years, when they were distributed under an order of the Orphans' Court, and some of them carried to other States, P. having actual notice of the Orphans' Court proceedings and of the consequent division of the slaves, and making at the time no objection to either. *Held*—I. That in a suit by P. against K. H. for the recovery of the slaves, it was not competent for him to prove that before he surrendered the slaves, J. H., one of the distributees, told him that if any of them fell to his share he would make him "a compliment" of them;—II. That the record of the proceedings in the Orphans' Court touching the distribution of the slaves was admissible evidence for K. H.;—III. That a receipt from P. to the administrator for "all demands in full against the estate," if he claimed under the

EVIDENCE---CONTINUED.

will, was relevant, but, if he claimed by independent title adversely to the estate, irrelevant testimony;—IV. That it was competent for K. H. to prove the application of P. to the Register in Chancery to enter into the bond required by the will, as conducing to show that he considered the slaves as passing by it.—*Harrison* v. *Pool*, 167

4. Where a record is introduced by a party to prove a particular fact, the opposite party is not entitled to avail himself of it as proof of other facts, for which he could not have used it as primary evidence.—*Herndon* v. *Givens*, 262

5. Where a record is composed of several distinct papers, they should be attached, that the court may be enabled to see that the clerk's certificate applies to all of them. But if this is not done, would it not be competent to establish the genuineness and authenticity of the transcript by showing that it is a sworn or examined copy?—QUERE? *Ib.*

6. If a witness, examined under commission, states facts which are admissible, but insufficient *per se* to make out the case, his deposition should not be excluded, if the party offering it announces his purpose to show their relevancy by other evidence.—*Scales* v. *Desha, Shepherd & Co.* 309

7. Hearsay evidence is inadmissible. *Ib.*

8. The declarations of an agent, acting within the scope of his authority, and of the party with whom he contracts, when made at the time of a transaction, are a part of the *res gestæ*, and admissible in evidence.—*Williams* v. *Shackelford*, 318

9. In a criminal prosecution, the only legitimate purpose, for which the accused can introduce evidence to show hostile feelings towards him on the part of a witness for the State, is to impeach his credit; and where, after such witness had testified to commissions by the accused of the offence charged at different times, it is proven that he did *a particular act* to entrap the accused, and thereby to procure additional evidence against him, it is not error in the court to refuse to instruct the jury, that "they might consider it as a circumstance tending to show that the witness had no proof before that time that would convict the defendant"—*Rossett* v. *The State*, 362

10. The possession of property by a bankrupt six years after he filed his petition, creates no presumption of fraud in the procurement of his discharge, and evidence of such possession, unaccompanied with other proof, is properly excluded from the jury.—*Powell* v. *Knox*, 364

11. The mere fact that a bankrupt, at some time prior to the filing of his petition, was owner of certain property, which is not returned in his schedule, raises no such presumption of fraud as will cast upon him the burden of explanation. *Ib.*

12. On the trial of an indictment for keeping an establishment for the sale of confectionary, &c. without license, evidence that the title to the premises, on which the business is carried on, is in a trustee for the use of the defendant's wife, is wholly irrelevant and properly excluded.—*Williamson* v. *The State*, 431

EVIDENCE—CONTINUED.

13. In a suit at law by partners, the admission of one of them, after the dissolution of the firm, that he has no right of action, is competent testimony in bar of the suit.—*Cochran & Estill* v. *Cunningham's Ex'r*, 448

14. In an action of trover, the declaration of the defendant in reply to a demand of the property, that he holds it as the guardian of a third person and that the plaintiff has no right to it, is not competent evidence in his own favor.—*Parker* v. *Goldsmith*, 526

15. The exception to the general rule, by which the declarations of the defendant in trover in reply to a demand of the property, when they amount to a reasonable excuse or qualification of his refusal to deliver it, are allowed to go to the jury, does not apply where the possession has been tortiously acquired. *Ib.*

16. Misrecitals in a sheriff's deed of the judgment or process, under which the sale was made, will not authorise the rejection of the deed as evidence, in an action by the purchaser to recover possession of land. —*Henley* v. *Br. Bank at Mobile*, 552

17. There is no error in permitting the plaintiff in an action of trespass to try title to give in evidence a notice served by him on the defendant, apprising him of his title and of his intention to claim rent.—*Herbert* v. *Hanrick*, 581

18. A motion entered on the docket, with the memorandum of the Judge written across it showing his action thereon, though not spread upon the minutes of the court, is *quasi* a record and admissible in evidence to prove the facts which it imports.—*The Governor, use* &c. v. *Bancroft et al.* 605

19. Where the trustee, in a deed for the benefit of creditors, permits the grantor until his death and his administrator afterwards to retain possession of and make a crop with the slaves of the trust estate, the admission of the administrator, who sold the crop and received its proceeds, as to the amount of such sale, is not evidence against the trustee.—*Harrison, adm'r, et al.* v. *Mock, et als.* 616

20. Any description in an order of the commissioners' court, appointing an overseer, by which the road can be ascertained, is sufficient; and such order is not void, or inadmissible in evidence, because it designates the road by a name different from that by which it is known in the neighborhood.—*Alexander* v. *The State*, 661

21. B., the owner of a slave, gave permission to W. to whip him whenever he should find him on his premises, and to use such means as were necessary and proper to keep him away. W. caught the slave on his premises, and whipped him, and, having found him there again, about three years afterwards, inflicted on him a whipping of much greater severity: *Held*—1st. That in an action of trespass for the second, evidence of the first whipping is admissible in mitigation of damages. 2d. That if the plaintiff desired to restrict its influence upon the jury, he should have asked appropriate charges of the court limiting its legal effect.—*Boling* v. *Wright et al.* 664

22. Where a witness, being asked by the prisoner's counsel why she put a

EVIDENCE—CONTINUED.

particular question to the deceased just before his death, answered that she did so "in consequence of what the prisoner had told her some two hours previous," this will not authorise the prisoner to give in evidence his conversation with the witness at the time referred to..—*McLean* v. *The State*, 672

23. The prisoner and the deceased having had a difficulty the evening before the homicide, the prisoner threatened that between the setting of the sun on that evening and its rising on the next day, he would kill the deceased: On the next morning, the sun having just risen, the prisoner, armed with a gun, was on the road that led to the house of the deceased, and immediately before he shot the deceased, had a conversation with a witness, who was examined upon the trial: *Held*—That if the witness, without objection on the part of the prosecution, is permitted to state that the prisoner in that conversation spoke of the difficulty of the evening before, the door is opened for the admission of the entire conversation, and it is error to exclude it, so long as the portion admitted is suffered to remain before the jury. *Ib.*

24. A witness, who is not a medical man, is incompetent to express an opinion as to the particular species of fits with which any one is afflicted. *Ib.*

25. Where insanity is set up as a defence to an indictment for murder, the subsequent as well as previous acts and declarations of the prisoner are admissible in evidence to show his true mental condition at the moment of the homicide. *Ib.*

26. Where a subsequent purchaser insists that, as against a prior grantee whose deed has not been recorded, he is a *bona fide* purchaser without notice, it is incumbent on him to prove the payment of a valuable consideration: The recitals in his deed are not evidence thereof.—*Nolen & Thompson* v. *The Heirs of Gwyn*, 725

27. On final settlement of the accounts of an executor or administrator, the Orphans' Court does not possess the power to render a decree in his favor, or to go further than to discharge him. Where the court, therefore, certifies a balance in his favor, it is *coram non judice*, and cannot be received as evidence against the administrator *de bonis non*.—*Brazier & Co.* v. *King*, 730

28. When an attorney, employed to collect money, is called on for a settlement, his admission of the amount collected is competent evidence against his client, but the client may nevertheless show by other proof that the fact admitted did notin truth exist.—*McRae et al.* v. *Ins. Bank of Columbus*, 755

29. The allegations of a bill not sworn to by the complainant are to be considered as the mere suggestions of counsel, but those contained in a bill, which is verified by him, are competent evidence against him. *Ib.*

30. Where insanity is set up as a defence to a criminal prosecution, it is competent for a witness, whose intimacy with the prisoner and opportunies for observation have been such as to enable him to form a correct judgment of his mental condition, not only to depose to facts, but

EVIDENCE—CONTINUED.

to give his opinion as to whether he was sane or not at the time of the commission of the offence.—*Norris* v. *The State*, 776

31. Where in a proceeding to have entry of satisfaction of an execution, the only issue joined is the fact of payment, proof that the judgment was assigned to a third person before the payment, does not tend to establish or disprove the issue, and is consequently inadmissible.—*Edwards* v. *Lewis*, 813

2. *Best and Secondary Evidence.*

32. If a subscribing witness to an instrument becomes incompetent from interest, without the fault or agency of the party who claims under it, secondary evidence is admissible to prove its execution.—*Exr's of Robertson* v. *Allen*, 106

33. Although a written instrument may contain the highest evidence of a witness' interest, it is not indispensably necessary to produce it.—The proof may be made by the witness himself on *voir dire*, or by any other person who is able to testify to the fact. *Ib.*

34. The affidavit of the complainant of the loss of a deed, is not evidence of the fact of loss, but such loss must be proved, and is usually arrived at inferentially.—*Owen et al.* v. *Paul*, 130

35. Where a bill alleges that a deed, charged to be lost, was deposited in the office of the Clerk of the County Court, proof should be made of a search in that office, as otherwise the presumption would arise that it was still there. *Ib.*

36. Where in an action against the endorser of a promissory note, the plaintiff swears that he delivered the note to an attorney for collection and has not seen it since, though he has made diligent search for it, and proves by the Clerk of the Court in which suit was instituted against the makers, that judgment was rendered at a particular term, and that all the papers in the cause had been abstracted from his office, a sufficient predicate is laid for the introduction of secondary evidence.—*Herndon* v. *Givens*, 261

37. On the death of a trustee, the title deed of the trust estate devolves on his personal representative, and a notice to produce it, given to one of the *cestui que trusts*, is not of itself sufficient to authorise the admission of secondary evidence.—*Powell* v. *Knox*, 364

38. A certified copy of the record of a deed, from the court of another State, is not admissible as secondary evidence, unless it be first shown that the deed was registered by authority of law. *Ib.*

39. Parol proof of an entry under a pre-emption right is inadmissible, without first showing that the record evidence thereof cannot be had.—*Phillips* v. *Beene*, 721

40. Where there is no subscribing witness to a lost deed, a sufficient predicate being laid to let in secondary evidence, its contents may be proved by any one who has read it and knows what it contains.—*Nolen & Thompson* v. *The Heirs of Gwyn*, 725

3. *Weight and Burden of Proof.*

41. The retention of possession, by the mortgagor, after the law day has

EVIDENCE—CONTINUED.

elapsed, is not *prima facie* evidence of fraud: It is, at most, but a circumstance from which fraud may be inferred.—*Dearing* v. *Watkins*, 20

42. The inventory returned to the court by an administrator is *prima facie* evidence against him, and, in the absence of other proof, is sufficient to charge him; but it is competent for him to show errors or mistakes in it, in order to relieve himself *pro tanto* from the charge.—*Craig & Wife McGehee & Armstrong*, 41

43. The possession of real estate by a vendor, after an absolute sale, is not of itself presumptive evidence of fraud, but is a circumstance merely from which fraud may be inferred, and as such is properly submitted to the jury.—*Noble et al.* v. *Coleman & Gunter*, 77

44. In a proceeding under the statute to try the right of property, the general issue, after the *onus* is shifted, puts the claimant upon proof of his right to interpose the claim.—*Foster* v. *Smith*, 192

45. A receipt for money is only *prima facie*, not conclusive evidence of the fact recited in it, and may be conradicted by oral tesimony.—*Driver, adm'r*, v. *Hudspeth*, 348

46. Where, upon the trial of an issue of fraud *vel non* in obtaining a discharge in bankruptcy, it is shown that five years before the filing of his petition the bankrupt was the owner of a certain slave, which was not rendered in his schedule, and that four years after his discharge the same slave was in his possession, the law raises the presumption that he was the owner of the slave during the *interim*, and devolves upon him the necessity of showing by competent proof that such was not the fact.—*Powell* v. *Knox*, 361

47. An answer responsive to the allegations of the bill, or to interrogatories therein, which the defendant is bound to answer, is evidence for him must and prevail, unless outweighed by other testimony.—*Hogan et als.* v. *Smith et als.* 600

48. To render the annual settlements of an administrator *prima facie* evidence, so as to dispense with further proof of the items on final settlement, it is necessary that the distributees should have been allowed an opportunity of objecting to the items, and contesting their correctness.—*Willis' Adm'r* v. *Willis' Distributees*, 652

49. To support a count on an account stated, it is not necessary to prove that there had been different items of account, cross demands, or mutual dealings between the parties: The admission of a certain sum due, in respect of a demand for which an action would lie, is evidence sufficient to sustain it.—*Ware & Cowles* v. *Dudley*, 742

50. Although in an action of slander for charging the plaintiff with perjury, it is necessary for the defendant, if he pleads justification, to support his plea with such proof as would be required to convict the plaintiff on an indictment for that offence, yet it is not necessary, as in a criminal prosecution, that it should be of that degree of certainty requisite to remove all reasonable doubt from the minds of the jury.—A mere preponderance is sufficient.—*Spruil* v. *Cooper*, 791

EVIDENCE—CONTINUED.

4. *Parol Evidence.*

51. Parol evidence is inadmissible in a trial at law, to prove a consideration inconsistent with, or different from, that expressed in a deed.—*Murphy, Trustee* &c. v. *Br. Bank at Mobile,* 90

52. In the examination of a witness on *voir dire,* it is permissible for him to testify as to the contents of written instruments that are not produced..—*Herndon* v. *Givens,* 262

53. Where a deed of assignment is not fraudulent on its face, it is competent to show by parol proof that no secret fraud was intended to be consummated by it.—*Abercrombie* v. *Bradford,* 560

54. A party to a deed or other instrument, who alleges a mistake in drawing it, must become an abtor in seeking to reform it: until reformed, it is the htghest evidence of the contract, and cannot be contradicted or varied by parol proof.—*Hogan et als.* v. *Smith et al.s* 600

55. Where the return of a sheriff upon a writ of attachment fixes on him a liability to the plaintiff, it is not competent for him in a suit by the latter founded on such return to prove that it is incorrect. In such case, a direct application for leave to amend the return should be made to the court whence the process issued.—*The Governor, use* &c. v, *Bancroft,* 605

56. A mortgagee may release his mortgage by a sufficient parol agreement, although the mortgage be under seal and the debt unpaid.—*Wallis* v. *Long,* 738

5. *Dying Declarations.*

57. On the trial of an indictment for murder, the declarations of the deceased, touching the homicide, although he does not state at the time that he is conscious of impending death, if made under such circumstances as in the judgment of the court will reasonably warrant such an inference, are admissible in evidence as dying declarations.—*McLean* v. *The State,* 672

58. Where the deceased, being asked "who shot him," replied, "the prisoner," the declaration is complete, and cannot be rejected because, from weakness and exhaustion, he was unable to answer another question, propound d to him immediately afterwards. *Ib.*

59. Dying declarations are admissible in evidence, wherever their subject matter has reference to facts and circumstances, which would constitute a part of the *res gestæ.* *Ib.*

See *Depositions.*
Estoppel,
Witness.

EXCEPTIONS, BILL OF.

1. Every legal intendent is made in favor of the affirmance of judgments, and where a charge of the court as applicable to the facts of the case may or may not be correct, it is incumbent on the party complaining to set out in the record so much of the evidence as is necessary to show its error.—*Greene* v. *Tims, use &c.* 541

EXECUTION, WRIT OF.

1. Whether a sheriff, who has levied on and advertised property under one execution, can sell under another, which has not been levied—QUERE?—*Bliss* v. *Watkins*, 229
2. The levy of an execution on real estate does not divest the title of the defendant, and if the execution is retured without a sale, and the defendant die before any further proceedings are had thereon, the title descends to the heirs at law.—*Fry* v. *Br. Bank at Mobile*, 282
3. The interest of a vendee of land, who holds a bond for titles and has paid the purchase money, cannot be sold under execution at law, and such sale confers no title upon the purchaser.—*Hogan et als.* v. *Smith et als.* 600
4. A sale under execution is not void, merely because the officer sells a less interest in the property than the defendant really owns.—*O'Conner* v. *Youngblood*, 718

See *Executors, &c.* 7, 14, 15.

EXECUTORS, ADMINISTRATORS, AND SURETIES.

1. Where a testator makes a pecuniary bequest, with the direction, that it "be kept and loaned out upon interest by my executors," until the happening of a certain event, then to be divided between the legatees, the executors will be considered as holding the fund *as executors*, and not *as trustees*.—*Perkins* v. *Moore, Judge, use, &c.* 9
2. An executor will be presumed to hold a legacy as executor, unless it clearly appears from the will, that the testator intended that he should hold in a different capacity. *Ib.*
3. If an executor, invested by the will with power over a legacy, *as trustee*, and not *as executor*, comes into possession of it in his representative capacity, his election afterwards to hold it *as trustee* must be manifested by some plain and unequivocal act, indicating such intention. *Ib.*
4. The inventory returned to the court bp an administrator is *prima facie* evidence against him, and, in the absence of other proof, is sufficient to charge him, but it is competent for him to show errors or mistakes in it, in order to relieve himself *pro tanto* from the charge.—*Craig & Wife* v *McGehee & Armstrong*, 41
5. Where an administratrix, duly authorized by the court to keep together the personal estate of her intestate for the term of ten years, unites her own labor, and that of a slave, belonging to her, with the labor of the slaves of the estate,—charges herself with the entire proceeds of the crops,—and, by her prudence and diligence, so manages the trust as to advance the interest of the beneficiaries,—she is entitled, on final settlement, to a fair compensation for the services of herself and slave. *Ib.*
6. An administratrix, who has managed the estate with prudence and in good faith, and who has been guilty of no default in settling, when required to do so, does not forfeit her right to compensation, by her omission to make *annual* returns. *Ib.*

EXECUTORS, ADMINISTRATORS, &c.—CONTINUED.

7. A return of no property, on an execution issued against the administrator of a deceased executor, upon final settlement of his intestate's administration, will not authorise the issuance of execution against the securities of the executor.—*Jenkins* v. *Gray et al.* 100
8. It is competent for an executor or administrator to submit to arbitration a controversy in which the estate is concerned.—*Jones, adm'r,* v. *Deyer & Wife,* 221
9. Where an administrator *de bonis non* pays to a former administrator a sum of money, which he advanced, during his administration, to satisfy a demand with which the estate was justly chargeable, he is entitled to an allowance for the sum so paid, in the settlement of his accounts.—*Hearrin, adm'r,* v. *Savage, adm'r,* 286
10. The reasonable fees of attorneys, who were retained *bona fide* by a former personal representative to protect the interests of the estate, are, when paid by the administrator *de bonis non,* proper allowances in his favor, and, being part of the expenses incident to the administration, the sum so paid cannot be abated, although the estate is declared insolvent. *Ib.*
11. Where, in consequence of the neglect of the administrator to take possession of the slaves of the estate, they are removed to another State, the estate is not liable for the expenses and compensation of an agent and attorney, employed by a creditor, who pursues and recovers them, without any contract with the administrator. *Ib.*
12. If, after a decree of insolvency, the administrator pays in full claims which are not privileged, or which create no lien on the estate, he will occupy the place of the creditors, and is only entitled to a *pro rata* allowance. But in such case it would be proper upon the settlement of his accounts to permit him to retain the *pro rata* shares of the creditors whose claims he represents, if they can be ascertained before a final dividend is declared. *Ib.*
13. Since the passage of the act of 1843, where a judgment is rendered against an administrator, within eighteen months from grant of administration, and execution is returned no property, it is a good defence to an action thereon against him, suggesting a *devastavit,* that, after the rendition of such judgment, the estate was regularly declared insolvent.—*Powe & Smith* v. *Sterrett, Judge, &c.* 339
14. A return of no property upon an execution, issued on a final decree against the administrator in the Orphans' Court, but not made returnable to a regular term of the County Court, will not authorise the issuance of execution against the securities to the administration bond. —*Little et al.* v. *Heard et ux.* 358
15. An administrator, who, as distributee of the estate, obtains a decree and execution against his co-administrator for assets received and not accounted for, cannot, on a return of no property, have execution against the joint securities of himself and co-administrator. *Ib.*
16. If an administrator receives as assets of the estate a note, secured by

EXECUTORS, ADMINISTRATORS, &c.—CONTINUED.

mortgage on property more than sufficient to pay it, and makes no effort to enforce the security, he is chargeable with the amount of the note, notwithstanding the insolvency of the maker, unless he shows some satisfactory reason for his failure to do so.—*Willis' Adm'r* v. *Willis' Distributees*, 652

17. An administrator, who, after receiving the assets of the estate, is superseded by the appointment of another, and, upon the resignation of the latter, again invested with the trust, is liable on final settlement of the administration last assumed to account for the assets received on the first, and not delivered by him to the intermediate administrator. *Ib.*

18. Under the act of 1821, (Clay's Dig. 227, § 30,) the administrator *de bonis non* of an estate is the proper person to revive and enforce a judgment belonging to the estate, and recovered in the name of the deceased administrator in chief.—*Warren, ex'r*, v. *Rist, adm'r*, 686

19. On the marriage of an administratrix, the husband becomes administrator in her right for his own safety, and takes upon himself all the duties, and is entitled to all the privileges, which belonged to her before the marriage: He is therefore the proper representative of both, and service of citation upon him alone is sufficient to support a final settlement of the administration.—*Kavanaugh & Wife* v. *Thompson & Wife et als.* 817

20. On the final settlement of the estate in the Orphans' Court, the distributees sought to charge the administrators with the value of four slaves, which they had returned in the inventory, and produced in evidence the record of a judgment in detinue, rendered some eight years before, in favor of the administrators, as such, against one E. L., showing the recovery of the slaves in question. The administrators, to show that the slaves nevertheless were not assets of the estate, offered to prove that during the pendency of the suit, E. L., who was insolvent, filed his bill in chancery against them, claiming one half of the entire estate of their intestate; that a compromise was effected, by which it was agreed that E. L. should dismiss his bill, relinquish his claim to all the estate, except the slaves sued for by the administrators, and allow judgment to go against him for *them*, for the purpose of protecting them against liability for his debts; and that, this arrangement having been carried out, one of the administrators, in his own right, afterwards purchased the slaves from E. L. The court rejected the proof. *Held*—1st. That the trust in favor of E. L., which it was the object of the evidence to establish, was void, by reason of the fraud intended his creditors, and being void, the exclusion of the evidence was not erroneous, since its admission could not possibly have affected the result. 2d. That by the recovery, the slaves or their alternate value, if insisted on by the distributees, were assets of the estate, and the administrators chargeable with such value for neglecting to enforce the judgment.—3d. That the title to the slaves, acquired by the purchase from E. L., cannot, under the circumstances, be set up against that of the estate. *Ib.*

21. Where administrators are guilty of a conversion, in permitting a slave belonging to the estate to go into the possession of a third person, and the

EXECUTORS, ADMISTRATORS, &c.—CONTINUED.

slave is lost, the distributees may elect either to accept another slave that the administrators have substituted in the stead of the one lost, or to charge them with his value. If they elect the latter, the court may properly charge the administrators with the amount recovered by them from the person in whose possession the slave was, when lost, as the value of such slave.—*Ib.* 818

See *Actions, &c.* 1.
Costs, 1, 2.
Error, 18, 19.
Judgment and Decree, 1.
Orphans' Court, 1.
Parties to Actions, 1.

FORMER RECOVERY.

See *Pleadings at Law*, 2, 3.

FRAUD.

1. Fraud pollutes public as well as private sales, and in an action of trespass to try titles, between parties claiming by purchase under execution against the same defendant, it is error to exclude evidence tending to show that the deed of the sheriff, upon which the plaintiff relies, was fraudulently obtained, and was intended to delay and hinder creditors.—*Forrest & Lyon* v. *Camp*, 642
2. A court of equity acts *in personam*, and, when it has jurisdiction of the person, will afford relief against fraud, notwithstanding the property, in reference to which the fraud has been committed, is without the jurisdiction. In such case, the relief will be adapted to its equity and justice, and if the fraudulent grantee refuses to return the property, he may be charged with its value.—*Stapler et al.* v. *Hurt's Ex'rs*, 799

See *Assignments*, 1, 2, 4, 5.
Case, Action on, 1.
Estoppel, 5.
Evidence, 41, 43, 46.

FRAUDS, STATUTE OF.

1. The first section of the Statute of Frauds (Clay's Dig. 254) does not require that a written undertaking to pay the debt of another should state the consideration of the promise.—*Thompson* v. *Hall*, 204
2. Every writing, which is the foundation of an action, being made by the statute of 1811 (Clay's Dig. 340, § 152) "evidence of the debt or duty for which it was given," it is not necessary, in declaring on a promissory note, to allege the consideration. The fact that the note appears on its face to have been given for the debt of another cannot affect the principle. *Ib.*

GAMING.

1. Where W. loses at gaming the note of H., given for W.'s accommodation, and the winner loses it in the same way to M. & S., or transfers

GAMING—CONTINUED.

it to them in discharge of a gambling debt, M. & S., not being *bona fide* holders, cannot by an arrangement between themselves, confer upon the note a validity which it did not previously possess.—*Whitlock* v. *Heard*, 336

See *Bills of Exchange, &c.* 1.

GARNISHMENT AND GARNISHEE.

1. Where a plaintiff in garnishment, during the term at which the answer of the garnishee is filed, makes affidavit of its incorrectness, it is a sufficient initiation of the contest, provided for by the statute, without an issue being then formed.—*Marston* v. *Carr*, 325
2. In a contest between the creditor and garnishee of a debtor, if the garnishee voluntarily joins issue and goes to trial, it is a waiver of any previous irregularity in the proceedings. *Ib.*
3. An affidavit of the incorrectness of the answer of a garnishee is all that is necessary to the regularity of an issue in a contest between him and the creditor. *Ib.*
4. Where a garnishee answers that certain effects, which he admits are in his hands, are going to the debtor of the plaintiff or to the heirs of F., but that he is informed the debtor has no interest in them, except as the agent of he heirs of F., no judgment can be rendered upon the answer; but the heirs of F. should be summoned to contest with the plaintiff the fact of the garnishee's indebtedness. *Ib.*
5. In a contest between the creditor and garnishee of a debtor, the debtor is *prima facie* an incompetent witness for the garnishee. *Ib.*
6. The possession by a garnishee of promissory notes and title deeds to real estate, in which the debtor has an interest, will not authorise the rendition of a judgment against him. *Ib.*
7. The answer of a garnishee, found in the transcript and identified by the minute entry, must be regarded as a part of the record.—*Jones, garnishee*, v. *Howell*, 695
8. Where a garnishee denies that he is indebted to or has in his hands any effects of the debtor, and his answer is not controverted, he is entitled to a discharge, and cannot be held to answer further for a probable future indebtedness. *Ib.*

See *Intendments, &c.* 8.

GIFT.

1. The declaration of J., that he had given a slave to B., and then hired it from him, without a delivery of the slave, is insufficient to perfect a parol gift.—*Bryant* v. *Ingraham*, 117
2. A promissory note may be the subject of a gift *inter vivos* or *causa mortis*, but, in either case, an actual delivery to the donee, or to a third person for him, is essential to its validity.—*Jones, adm'r*, v. *Deyer and Wife*, 221

See *Court, Charge of*, 2.

GUARDIAN AND WARD.

1. A guardian is bound to use ordinary prudence and diligence in managing the estate of his ward, and if he brings suits in the ward's name, where no cause of action exists, he is personally chargeable with the costs, although he may have acted under the advice of counsel.—*Savage, guardian &c.* v. *Dickson*, 257
2. A guardian should ascertain the facts of the case, before he brings suit for his ward, and if he *heedlessly* sues on a supposed state of facts, which in truth does not exist, he is personally liable for the costs incurred. *Ib.*
3. If the guardian of an infant, without an order from the Chancellor, or Judge of the Orphans' Court, appropriate the principal of his ward's funds to any purpose whatever, he does so at his peril, but if the appropriation was such as the Chancellor or Judge would, on application, have authorised and directed, he should be allowed it on the settlement of his accounts.—*Stewart, guardian*, v. *Lewis, by his guardian*, 734

HUSBAND AND WIFE.

1. Where property is bequeathed in trust "for the maintenance of a married man and his family," the entire interest, as between him and his wife, vests absolutely in the husband, and, there being no children, his administrator, after his death, may recover the possession of the property from the wife in an action of detinue.—*Allen & Wife* v. *White, adm'r*, 181
2. Money of a female ward in the hands of her guardian must be considered as in her possession, and, as upon marriage the legal existence of the wife is merged in that of the husband, the possession is by operation of law transferred to him, and his marital rights thereupon immediately attach.—*McDaniel* v. *Whitman, guardian*, 343
3. In a suit at law on a note given for the purchase money of slaves sold and delivered to the defendant, damages in respect to them, resulting from the tortious act of the vendor's wife committed in his absence, cannot be allowed as a discount or set off, it not appearing that the husband consented to the tort, or gave it his subsequent sanction.—*Vaught* v. *Wellborn*, 377
4. A wife, without the privity of her husband, has no power to rescind his contracts. *Ib.*
5. Slaves purchased by a wife, in the life-time of her husband, with her separate estate or the proceeds thereof, will be regarded in a Court of Equity as standing in the same predicament, in respect to the title, as the money that was paid for them; and if she is in the possession of slaves thus purchased, or in which her husband has conceded to her the exclusive title, she may, after his death, successfully defend an action at law brought by his personal representative for their recovery. The fact that the purchase was made from the husband himself cannot affect the principle.—*Puryear, ex'r*, v. *Puryear*, 486

HUSBAND AND WIFE—CONTINUED.

6. If a wife purchases property from a firm, of which her husband is a member, pays for it with money furnished by him, and with his acquiescence takes a bill of sale in the name of a third person for her use, will not the transfer of the title operate as a postnuptial settlement and be effectual against all persons except creditors and purchasers?—QUERE. *Ib.*
7. The use of the wife's money by the husband, in the purchase or the redemption of his own encumbered property, will not *per se* invest the wife with such a title as will enable her, after her husband's death, to successfully defend an action at law brought by his personal representative for its recovery, and a charge to the jury which assumes the reverse of this principle is clearly erroneous. *Ib.*
8. Where a wife is the sole distributee of an estate, and the husband pays all the debts and takes possession of the assets witout administration, claiming them as his absolute property by virtue of his marital rights, although the legal title is not thereby vested in him, yet he acquires such an equitable interest in the property as a Court of Chancery will protect as against those who, after the death of the wife, may seek distribution thereof as the next surviving kin of the intestate.—*Vanderveer* v. *Alston et als.* 494

See *Chancery*, 2, 3, 15.
Criminal Cases, &c. 4.
Wills, &c. 1, 2.

INDIAN TITLES.

1. Upon the approval by the President of a contract, made by an Indian reservee under the Creek Treaty of 1832, for the sale of his land, the title of the purchaser relates back to the date of the contract, and inures to his intermediate vendee, whether by quitclaim or warranty deed.—*Nolen & Thompson* v. *The Heirs of Gwyn*, 725

INDICTMENT.

1. An indictment, under the statute of 1848 (Acts 32, § 98,) for keeping an establishment for the sale of confectionary, &c. without license, is not demurrable, because it was not prefered at the instance of an informer.—*Williamson* v. *The State*, 432
2. An indictment against the overseer of a road, which describes it as "a public road of the second grade, beginning at and leading from the twenty-third mile post to the county line," is sufficiently certain.—*Alexander* v. *The State*, 661
3. In the criminal prosecution of a slave for murder, the indictment must allege who the owner is at the time it is found, and the allegation must be supported by the proof.—*Phereby, a slave*, v. *The State*, 774

INFANTS AND INFANCY.

1. Where an infant receives a sum of money, and covenants to pay it over in specified amounts to particular persons in another State, the

INFANTS AND INFANCY—CONTINUED.

covenant is viodable merely and not void. Such contract is not necessarily prejudicial to him; nor does he thereby subject himself to damages, or a breach of trust in respect of a third person.—*West* v. *Penny*, 186

2. The verbal affirmance of a contract, made during minority, renders it valid from its date, and, whether under seal or not, the contract may be declared on without noticing the subsequent promise. The subsequent promise is in legal effect but a waiver of the defence of infancy, and a ratification of the original contract. *Ib.*

See *Chancery*, 10, 11.

INJUNCTION.

See *Chancery*, 8, 9.

INSANITY.

1. Where insanity is set up as a defence to an indictment for murder, the subsequent as well as previous acts and declarations of the prisoner are admissible in evidence to show his true mental condition at the moment of the homicide.—*McLean* v. *The State*, 673

2. Where insanity is set up as a defence to a criminal prosecution, it is competent for a witness, whose intimacy with the prisoner and opportunities for observation have been such as to enable him to form a correct judgment of his mental condition, not only to depose to facts, but to give his opinion as to whether he was sane or not at the time of the commission of the offence.—*Norris* v. *The State*, 776

INSOLVENT DEBTORS.

1. The bond of a debtor, conditioned for his appearance before two justices to take the benefit of the act for the releif of insolvent debtors, is not forfeited, if, after ten days' notice to the creditor, he appears at the time and place appointed, with the inteniton of complying with its condition, but is prevented from doing so by the failure of one of the justices to attend.—*Rust et al.* v. *Paine*, 352

2. The transfer of property by a debtor, after his arrest and the execution of a bond to take the benefit of the act for the releif of insolvent debtors, does not constitute such a breach of the condition of the bond as can be inquired into in an action on it against the debtor and his security. *Ib.*

INTENDMENTS AND LEGAL PRESUMPTIONS.

1. Where an error is shown to have been committed by the primary court, the presumption is that it worked an injury to the party complaining; and the judgment must consequently be reversed, unless it satisfactorily appears that no injury could have ensued.—*Executors of Robertson* v. *Allen*, 106

2. Where service of the writ has been accepted, and omitted to be proved, it may be proved and entered at a subsequent term; and where

INTENDMENTS, &c.—CONTINUED.

the record disclosed an order "that proof of the acceptance of the writ be now entered as of the last term," this court will intend that the proof was made.—*Godbold et al.* v. *Meggison, adm'r*, 140

3. A witness, sworn in support of an indictment founded on a statute, which, in case of conviction, gives one half the penalty to the informer, is not to be considered the informer, from the mere fact that he is the only witness in the case.—*Williamson* v. *The State*, 431
4. Where, on an application to set aside a sale under execution, the judgment entry recites "that the petition, answers, and *affidavits* of the respective parties were in file and submitted, and that upon an inspection and consideration of these, the rule &c. was discharged," are not the affidavits filed on behalf of the petitioner to be regarded as a part of the record?—QUERE.—*Lee* v. *Davis et al.* 516
5. Every legal intendment is made in favor of the affirmance of judgments, and where a charge of the court as applicable to the facts of the case may or may not be correct, it is incumbent on the party complaining to set out in the record so much of the evidence as is necessary to show its error.—*Greene* v. *Tims, use &c.* 541
6. Where a *scire facias* to revive a judgment recites that B. W. in his life time, "under the style and description of B. W., administrator of all and singular the goods and chattels, rights and credits of E. J. C., deceased," recoverd a judgment, &c., it cannot be intended that the judgment was recovered by him as administrator, but the words "style," &c. must be regarded as descriptive merely.—*Warren, ex'r*, v. *Rist, adm'r*, 686
7. Where, on the application of an administrator for final settlement, the court orders publication "for three consecutive times," &c., and the decree recites that it was so made, it cannot be intended that publication was made for *three consecutive weeks*, as required by the statute, and the decree is consequently erroneous.—*Jenkins' Distributees* v. *Jenkins' Adm'rs*, 693
8. The answer of a garnishee, found in the transcript and identified by the minute entry, must be regarded as a part of the record.—*Jones, garnishee*, v. *Howell*, 695
9. Where the court gives an *affirmative* charge, which asserts an erroneous legal proposition, the presumption is, in the absence of every thing to exclude it, that there was some evidence on the point, that called for instruction, although none appears in the bill of exceptions.—*Ware & Cowles* v. *Dudley*, 742

JUDGMENTS AND DECREES.

1. The decree of an Orphans' Court against an executor or administrator on final settlement, in the absence of fraud, is conclusive both as to him and his securities.—*Perkins* v. *Moore, Judge, use*, &c. 10
2. A judgment on general demurrer to the declaration is a judgment on the merits, and is conclusive in a subsequent suit on the same cause of action.—*Perkins* v. *Moore, Judge*, &c. 17

JUDGMENTS AND DECREES—CONTINUED.

3. A judgment or decree of a court, having jurisdiction of the parties, and the subject matter, however erroneous, until reversed or annulled is binding upon them as to every question directly decided.—*Cole, adm'r*, v. *Conolly*, 271
4. The judgment of a court of record in this State for costs, under the act of 1812, (Clay's Dig. 205,) creates a lien on the lands of the defendant from the date of its rendition.—*Forrest & Lyon* v. *Camp*, 642
5. A decree of the Orphans' Court, rendered on the day that the administrator presents his accounts and vouchers for settlement—without the accounts being previously examined, audited, stated, and reported by the judge for allowance at a succeeding term—without the appointment of guardians *ad litem* for the infant distributees—and without an order as to the person or persons to whom the balance found in the administrator's hands is to be paid—conforms to none of the requisites essential to a final decree. *Willis' Adm'r* v. *Willis' Distributees*, 652
6. A judgment *nisi*, which does not designate the party in whose favor it is rendered, is insufficient to support a final judgment.—*Spence* v. *Simmons et al.* 828

See *Chancery—Pleading and Practice in*, 25, 26.
Criminal Cases, &c. 2.
Lien, 1, 3.
Principal and Agent, 6.
Verdict, 1.

JURISDICTION.

1. Has the Criminal Court of Mobile jurisdiction of an offence violative of the 98th section of the Revenue Act of the 6th March 1848?—Qu. —*Moore* v. *The State*, 411

See *Chancery*, 4.
Orphans' Court, 4, 5, 6, 7, 8, 13, 14.
Partition, 4.
Wills, &c. 3.

LANDLORD AND TENANT.

1. If a tenant abandons the premises before the expiration of the term, the landlord may suffer them to remain vacant and recover the rent, or he may enter and determine the contract, in which event he would be entitled to recover only for the rent then due.—*Schuisler & Donnell* v. *Ames*, 73
2. A tenant is estopped from setting up against his landlord or those who claim under him a title adverse to that which he acknowledged by his tenancy. If he relies on a title acquired after the term of his landlord expired, he should show or propose to show it in connection with his evidence of title.—*Henley* v. *Br. Bank at Mobile*, 553
3. The lien of a lessor on the goods and chattels upon the premises, for the rent due at the time of their seizure under attachment or execu-

LANDLORD AND TENANT—CONTINUED.

tion, may be enforced by motion to the court to which the process is returnable, to direct an application of so much of the proceeds of the sale as may be necessary to discharge it.—*The Governor, use &c.* v. *Bancroft et al.* 605

See *Estoppel*, 3.
Use and Occupation, 1, 3.

LIEN.

1. Where judgments are rendered on the same day, in favor of different plaintiffs, neither is entitled to priority on the ground of *lien;* but if *one* of the plaintiffs first sues out execution and proceeds to a levy and sale of the land of the defendant, he will gain a preference over the *other*, by reason of his superior diligence, and must be first satisfied, notwithstanding the *other* may have placed his execution in the hands of the sheriff before the sale.—*Bliss* v. *Watkins*, 229

2. A vendor of land, who has executed his bond, conditioned to make title upon the payment of the purchase money, has a lien on the land until such payment is made, and the vendee must show that he has an equitable right to the land, freed from such lien, before the Orphans Court can decree that the legal title be conveyed to him by the personal representative of the vendor. Such a lien is regarded in the nature of a mortgage, and the fact that the notes given for the purchase money are barred by the statute of limitations does not destroy it.—*Driver, adm'r*, v. *Hudspeth*, 348

3. A judgment, rendered against a bankrupt before petition filed, is not a lien on real estate, held by him under an equitable title merely.—*Powell* v. *Knox*, 364

4. The judgment of a court of record in this State for costs, under the act of 1812, (Clay's Dig. 205,) creates a lien on the lands of the defendant from the date of its rendition.—*Forrest & Lyon* v. *Camp*, 642

5. H., an inn-keeper, furnishes G., who is not his guest, but a mail contractor, with stables and provender for his horses for more than two years, during which time they are under the care of, and fed by the servants of G., and regularly used by him in running his stages to and from the stables of H. *Held*,—That H. has no implied lien on the horses for the debt thus contracted by G.—*Hickman* v. *Thomas*, 666

See *Execution, &c.* 3.

LIMITATIONS, STATUTE OF, AND PRESCRIPTION.

1. Will any length of time enable a party to prescribe for a nuisance—QUERE?—*Lewis* v. *Stein*, 214

2. No grant, licence or authority to erect or continue a nuisance can be

LIMITATIONS, &c.—CONTINUED.

presumed from length of time, in opposition to repeated intermediate expressions of the Legislative will, prohibiting its erection. *Ib.*

3. Statutes of limitations do not run against the Government, unless it is expressly named; nor against its grantee, until the Government has divested itself of the title.—*Doe ex dem. Kennedy's Ex'rs* v. *Townsley's Heirs*, 239

4. To entitle a party to insist upon the statute of limitations, his possession must have been notorious, uninterrupted, and under an adverse claim of title for the period prescribed by the statute; and these are questions of fact for the determination of the jury. *Ib.*

5. According to the law in force in Mobile, whilst under the dominion of Spain, prescription must rest on "good faith and just title." A possession commenced by intrusion is deficient in both. *Ib.*

6. Can the title of the Government be divested by prescription?—QUERE. *Ib.*

7. Non-assumpsit *infra sex annos* is a good plea in *indebitatus assumpsit*.—*Ware & Cowles* v. *Dudley*, 742

See *Lien*, 2.

MALICIOUS PROSECUTION.

1. A count, which avers "that the defendant falsely, maliciously, and without probable cause, charged the said plaintiff with the crime of felony, and upon said charge, falsely, maliciously, and without probable cause, caused the said plaintiff to be arrested by his body, and to be imprisoned and kept and detained in prison for a long time, to-wit, for the space of one day then next following, at the expiration of which said time, he the said defendant caused the said plaintiff to be released and set at liberty, and wholly abandoned his said prosecution," is not a good count in case for malicious prosecution, but is a good count in trespass for false imprisonment.—*Ragsdale* v. *Bowles*, 62

2. If counts in case and trespass be joined, and the defendant demurs to one count only, the demurrer must be overruled. The mis-joinder can be reached alone by demurrer to the declaration. *Ib.*

MARRIAGE AND MARRIAGE SETTLEMENT.

1. T. M. N. and A. M. C., in contemplation of marriage, enter into a contract, by which it is covenanted and agreed, that the said T. M. N., the intended husband, on the consummation of the marriage, shall have and receive all the property of the said A. M. C., and in consideration thereof, and in lieu of dower, shall settle on the said A. M. C., for her own proper use and benefit, free from his liabilities, a sum of money equal to the value of the property thus

MARRIAGE, &c.—CONTINUED.

received, and charge his estate to that extent: *Held*, that on proof being made that the marriage was solemnized, and that the said T. M. N. thereupon received from the said A. M. C. property of the value of twenty thousand dollars, a deed of trust, afterwards executed, in consideration of the provisions of said contract, by the said T. M. N. to W. M. N., to secure to the said A. M. C. the payment of the said sum of twenty thousand dollars, is not voluntary, but is founded on a full and valuable consideration.—*Lockwood* v. *Nelson*, 294

2. If a wife purchases property from a firm, of which her husband is a member, pays for it with money furnished by him, and with his acquiescence takes a bill of sale in the name of a third person for her use, will not the transfer of the title operate as a postnuptial settlement and be effectual against all persons except creditors and purchasers?—QUERE.—*Puryear, ex'r*, v. *Puryear*, 486

3. An antenuptial agreement, by which the intended wife, in consideration of the settlement of her own estate to her sole and separate use, releases and relinquishes to her expected husband all claim to dower in the lands of which he may be seized during the coverture, is not a bar to a proceeding at law, after his death, for an allotment of her dower.—*Blackmon* v. *Blackmon et als.* 633

MISTAKE.

1. A party to a deed or other instrument, who alleges a mistake in drawing it, must become an actor in seeking to reform it: until reformed, it is the highest evidence of the contract, and cannot be contradicted or varied by parol proof.—*Hogan et als.* v. *Smith et als.* 600
2. Where the return of a sheriff upon a writ of attachment fixes on him a liability to the plaintiff, it is not competent for him in a suit by the latter founded on such return to prove that it is incorrect. In such case, a direct application for leave to amend the return should be made to the court whence the process issued.—*The Governor, use* &c. v. *Bancroft*, 605

MORTGAGE.

1. An unregistered mortgage is valid and operative against subsequent purchasers, with notice. The fact that the mortgage was executed in another State, whilst the property was in this, cannot affect the principle.—*Dearing* v. *Watkins*, 20
2. If W. borrows money from C., and transfers to him, "*as collateral security*" for its re-payment, the note of a third person, for nearly double the amount of the sum borrowed, with the condition that in case of W.'s default, "*C. is to hold the note as his own property*," such transfer, notwithstanding the condition, is to be deemed a security merely, and not a conditional sale.—*Williamson* v. *Culpepper*, 211

MORTGAGE—CONTINUED.

3. If the parties to an instrument, at the time of its execution, intend it as a security, whatever may be its form, equity will consider it a mortgage; and no terms or words used in it will be allowed to change its character and cut off the right of redemption.—*Robinson* v. *Farrelly*, 472

4. Where the vendee retains the *right to demand re-payment* of the vendor, notwithstanding the purchase, and although the property should be lost, it is conclusive to show that the transaction was intended as a security and not a conditional sale. *Ib.*

5. If the vendee takes from the vendor no note or other evidence of the debt, it is a strong circumstance to show that a sale and not a mortgage was intended, but it is by no means conclusive. *Ib.*

6. Courts of Equity incline against conditional sales, and where it is doubtful from all the circumstances attendant on a transaction, whether a conditional sale or a mortgage was intended, Equity will treat it as a security merely.—*Turnipseed* v. *Cunningham*, 501

7. Where it is doubtful whether a transaction was intended as a conditional sale or a mortgage, it is the duty of the purchaser, who insists upon the former, to show clearly that such was the intention of the parties at the time of the transaction. *Ib.*

8. A mortgagee may release his mortgage by a sufficient parol agreement, although the mortgage be under seal and the debt unpaid.—*Wallis* v. *Long*, 738

See *Adverse Possession*, 3.

Deeds, and Registry of, 2, 3, 4.

MOTION.

1. The lien of a lessor on the goods and chattels upon the premises, for the rent due at the time of their seizure under attachment or execution, may be enforced by motion to the court to which the process is returnable, to direct an application of so much of the proceeds of the sale as may be necessary to discharge it.—*The Governor, use &c.* v. *Bancroft, et al.* 605

MULTIFARIOUSNESS.

1. A bill is multifarious, which unites a joint claim against several defendants, and a separate claim against one alone, with which the others have no connection.—*McIntosh et al.* v. *Alexander et als.* 87

2. The general rule is, that a demurrer for multifariousness, like a demurrer for a misjoinder at law, goes to the whole suit, and if sustained, the bill should be dismissed, and not made the ground of partial relief. *Ib.*

NEW TRIAL.

1. A writ of error will not lie on the order of an inferior Court granting a new trial.—*Walker* v. *Hale et al.* 26

2. If a motion is made for a new trial during the term at which a case is tried, the court may continue, and dispose of it at a succeeding term. *Ib.*

3. If a party moves for a new trial, but without awaiting the action of the Court, prosecutes a writ of error to this Court, where the judgment is affirmed, the primary Court has no longer the power to grant his motion. *Ib.*

NON-CLAIM, STATUTE OF.

1. The statute of *non-claim* does not begin to run in favor of the personal representative of the endorser of a negotiable note, until its maturity.—*Cockrill's Adm'r* v. *Hobson, use* &c. 391

2. The fact that an endorser, without the knowledge of the endorsee, was indemnified by the maker, and demand and notice thereby waived, cannot have the effect to set the statute of *non-claim* in operation before the maturity of the note. *Ib.*

3. The omission of the holder of a promissory note to present it to the personal representative of the deceased principal, within eighteen months after grant of letters of administration, will not release one co-surety from contribution to another, who has subsequently paid the debt.—*Evans, adm'r*, v. *Evans*, 465

NONSUIT.

1. The courts of this State cannot order a nonsuit, or compel a plaintiff to take one, without his consent.—*Saunders* v. *Coffin*, 421

NOTICE.

1. Whatever is sufficient to put a party on inquiry, must be regarded as sufficient to charge him with notice.—*Herbert* v. *Hanrick*, 581

NUISANCE.

1. Will any length of time enable a party to prescribe for a nuisance?—QUERE.—*Lewis* v. *Stein*, 214

2. No grant, licence or authority to erect or continue a nuisance can be presumed from length of time, in opposition to repeated intermediate expressions of the Legislative will, prohibiting its erection. *Ib.*

3. It is a nuisance to throw from day to day into water, used for the ordinary purposes of life, any substance that renders it less pure and excites disgust in those who use it. *Ib.*

ORPHANS' COURT.

1. Where on the final settlement of an estate, it is shown that a slave included in the inventory was purchased by the administratrix after the death of her intestate, and paid for with $375 of her individual funds, and $62.50 of the funds of the estate, and that in the accounts rendered she had debited herself with the latter amount and interest thereon, it is not error in the Orphans' Court to refuse to regard said slave as assets of the estate, or to charge the administratrix with its value.—*Craig & Wife* v *McGehee & Armstrong*, 41

2. Where an administratrix, duly authorized by the court to keep together the personal estate of her intestate for the term of ten years, unites her own labor, and that of a slave, belonging to her, with the labor of the slaves of the estate,—charges herself with the entire proceeds of the crops,—and, by her prudence and diligence, so manages the trust as to advance the interest of the beneficiaries,—she is entitled, on final settlement, to a fair compensation for the services of herself and slave. *Ib.*

3. It is error to decree a sale of the lands of a decedent on the petition of the personal representative, without the previous appointment of a guardian *ad litem* for the infant heirs. *Ib.*

4. The Orphans' Court has not the power to vacate a judgment for costs as to one party, and adjudge them against the other, at a term of the court subsequent to that at which the judgment was rendered.—*Noland et al.* v. *Lock*, 52

5. The Orphans' Court, except in cases of contested wills and insolvent estates, has no authority to summon a jury, unless it becomes necessary, in the progress of a cause, to ascertain the truth as to some disputed question of fact, in reference to which the testimony is so conflicting that the court is left in doubt as to what should be its decision. —*Savage, guardian &c.* v. *Dickson*, 257

6. To authorise the vendee of real estate, who holds the bond of the deceased vendor, to proceed in the Orphans' Court to compel the personal representative to make him a title, it is necessary that the petition should disclose that the deceased was the owner of the land at the time of his death.—*Driver, admr*, v. *Hudspeth*, 348

7. In proceedings on a petition by the vendee of real estate to compel the personal representative of a deceased vendor to make him a title, the Orphans' Court has no power to impannel a jury, unless a real doubt arises as to some disputed fact; and in such case the testimony showing the necessity for so doing must be spread upon the record. *Ib.*

8. A vendor of land, who has executed his bond, conditioned to make title upon the payment of the purchase money, has a lien on the land until such payment is made, and the vendee must show that he has an equitable right to the land, freed from such lien, before the Orphans

ORPHANS' COURT—CONTINUED.

Court can decree that the legal title be conveyed to him by the personal representative of the vendor. Such a lien is regarded in the nature of a mortgage, and the fact that the notes given for the purchase money are barred by the statute of limitations does not destroy it. *Ib.*

9. To render the annual settlements of an administrator *prima facie* evidence, so as to dispense with further proof of the items on final settlement, it is necessary that the distributees should have been allowed an opportunity of objecting to the items, and contesting their correctness. —*Willis' Adm'r* v. *Willis' Distributees*, 652

10. Where, on the application of an administrator for final settlement, the court orders publication "for three consecutive times," &c., and the decree recites that it was so made, it cannot be intended that publication was made for *three consecutive weeks*, as required by the statute, and the decree is consequently erroneous.—*Jenkins' Distributees* v. *Jenkins' Adm'rs*, 693

11. A guardian *ad litem* for infant distributees should be appointed a sufficient length of time before the day of final settlement to enable him to examine the accounts filed by the administrator; and the record should not only show the appointment, but his acceptance of the trust —otherwise the decree will be reversed. *Ib.*

12. On final settlement of the accounts of an executor or administrator, the Orphans' Court does not possess the power to render a decree in his favor, or to go further than to discharge him. Where the court, therefore, certifies a balance in his favor, it is *coram non judice*, and cannot be received as evidence against the administrator *de bonis non.* —*Brazier & Co.* v. *King*, 730

13. The Orphans' Court, that has jurisdiction of the person and estate of a minor, has the exclusive authority to appoint his guardian; and the appointment of such guardian by the Orphans' Court of a different county is void.—*Dorman, guardian*, v. *Ogbourne*, 759

14. When an Orphans' Court takes rightful jurisdiction of a minor and his estate, it cannot be divested of it, except in cases and under proceedings provided for by the act of the 13th February 1843, and the act of which that is amendatory. *Ib.*

15. A joint administrator cannot complain that separate judgments are rendered against him and his co-administrator for the assets found in their hands respectively: It is error without injury, and constitutes no ground for reversal.—*Kavanaugh & Wife* v. *Thompson & Wife et als.* 817

16. Administrators cannot complain that a decree, regular in form, is rendered against them in favor of infant distributees, without the appointment of guardians *ad litem.* *Ib.*

17. It is the duty of the court to protect the interest of minors, by permitting

ORPHANS' COURT—CONTINUED:

them, where they have an election, to make *that* which will be most advantageous to them, even after they have indicated an intention to make one which is less so.—*Ib.* 818

See *Evidence*, 42.
Estates of Deceased Persons, 1, 2, 3.
Judgment and Decree, 1, 5.
Partition, 4.
Wills, &c. 3.

PARENT AND CHILD.

1. A mother, in poor circumstances, is not bound to support her infant child, when it can be supported out of its own estate, and where she has done so, a just allowance should be made to her for its past maintenance.—*Stewart, guardian*, v. *Lewis, by his guardian*, 734

PARTIES TO ACTIONS.

1. The Judge of a County Court cannot sue, in his own name *alone*, on the bond of an executor or administrator. The suit must be in his name for *the use* of the person aggrieved.—*Perkins* v. *Moore, Judge, use* &c. 9
2. Under the act of 1821, (Clay's Dig. 227, § 30,) the administrator *de bonis non* of an estate is the proper person to revive and enforce a judgment belonging to the estate, and recovered in the name of the deceased administrator in chief.—*Warren, ex'r*, v. *Rist, adm'r*, 686
3. A proceeding by *supersedeas* to arrest and have entry of satisfaction of an execution, is a suit between the parties to the judgment, and the pleadings must be made up in their names. A stranger to the record, though he be the assignee of the judgment, cannot be permitted to intervene and tender an issue in his own name.—*Edwards* v. *Lewis*, 813

See *Sales under Judicial Process*, 3.

PARTITION.

1. Where land descends to six heirs, and some of them, without the concurrence of the others, transfer to a third person one undivided seventh part of the whole, it is not erroneous, on an application for partition under the statute, to divide the land into six equal parts only, and proceed to a partition without noticing the claim of such third person.—*Heirs of Bryant* v. *Stearns*, 302
2. The statute requires, that in a proceeding for partition, the surveyor and chain-carriers shall be sworn prior to the survey, and that the survey shall be made in the presence of the commissioners, but these facts

PARTITION—CONTINUED.

need not appear *in the return*. The legal presumption is, that the commissioners have done their duty, until the contrary is shown. *Ib.*

3. The mere fact that one of several coparceners, or tenants in common, is a lunatic, does not divest the jurisdiction conferred by the statute in proceedings for partition. *Ib.*

4. The Judge of an Orphans' Court has jurisdiction of an application for partition under the act of 1803 (Clay's Dig. 386.) The jurisdiction vests in him *as Judge*, and whether he be called the Judge of the County Court, or the Judge of the Orphans' Court, is wholly immaterial. *Ib.*

5. A proceeding under the act of 1803 for partition is not such a judgment, sentence or decree, as will sustain a writ of error. *Certiorari* is the only process by which it can be brought under review. *Ib.*

PARTNERS AND PARTNERSHIP.

1. It is well settled, that in an action at law by partners all must be entitled to recover, or the action cannot be maintained: When, therefore, one of two partners, either before or after the dissolution of the firm, does an act which bars him, it will equally preclude the other from bringing a suit in the partnership name.—*Cochran & Estill* v. *Cunningham's Ex'r*, 448

2. A subsequent parol ratification by one partner of a deed for land, executed by his copartner in the name of each, is an adoption of the deed as his own, and renders it binding upon him from its date.—*Herbert* v. *Hanrick*, 581

See *Evidence*, 13.
Witness, 9.

PAYMENT.

1. S., the endorser on a protested bill of exchange, held by the Branch Bank at Decatur, procured a discount of his note with a view of paying the bill, but having given no direction as to the application of the proceeds, they were placed to his credit on the books of the Bank, and some time afterwards applied by the cashier to the payment of the note, which was thereupon cancelled and delivered over to S. *Held*—That, in the absence of other proof, the note must be considered as extinguished, and no action can be maintained upon it by the Bank. *Shaw et al.* v. *The Br. Bank at Decatur*, 708

PLEADINGS AT LAW.

1. A declaration on an administration bond, after final decree in the Orphans' Court against the executor, which avers the bequest,

PLEADINGS AT LAW—CONTINUED.

the rendition of the final decree in favor of the plaintiff, and the refusal of the executor to pay, is sufficient.—*Perkins* v. *Moore, Judge, use*, &c. 9

2. A plea of former recovery, which discloses the fact that the former judgment was not a judgment on the merits, is bad on demurrer. *Ib.*

3. A plea of former recovery, which avers "that the plaintiff impleaded the defendant and one E. B. & E. E. in a previous action of debt, on the same bond and condition now sued upon, and in the same Court, and assigned in his declaration the same breaches of the condition of said bond now assigned," &c., identifies with sufficient certainty the two causes of action.—*Perkins* v. *Moore, Judge*, &c. 17

4. R. and others execute a bond to D., conditioned to "forever indemnify and hold harmless the said D. from all loss and liability as a stockholder or officer of the Irwinton Bridge Company," of which D. was the President. D. sues R. on the bond, and assigns as a breach of its condition, that a suit was instituted against the company, to conduct which it became necessary to retain counsel, and that the plaintiff, being its President, and authorized by it to manage said suit, finding it impracticable to engage the services of counsel on the credit of the company, did so on his individual responsibility, and has been compelled to pay therefor a certain sum of money, which the company has never refunded:—*Held*, that the assignment does not set out such a breach as entitles the plaintiff to recover, and that a demurrer to it should have been sustained.—*Ridgell* v. *Dale*, 36

5. A declaration in covenant must clearly show that the covenant is broken. *Ib.*

6. A count, which avers "that the defendant falsely, maliciously, and without probable cause, charged the said plaintiff with the crime of felony, and upon said charge, falsely, maliciously, and without probable cause, caused the said plaintiff to be arrested by his body, and to be imprisoned and kept and detained in prison for a long time, to-wit, for the space of one day then next following, at the expiration of which said time, he the said defendant caused the said plaintiff to be released and set at liberty, and wholly abandoned his said prosecution," is not a good count in case for malicious prosecution, but is a good count in trespass for false imprisonment.—*Ragsdale* v. *Bowles*, 62

7. If counts in case and trespass be joined, and the defendant demurs to one count only, the demurrer must be overruled. The mis-joinder can be reached alone by demurrer to the declaration. *Ib.*

8. In a proceeding by *scire facias* to revive a judgment, a plea that seeks to reach behind the judgment, or to set up a defence against the original cause of action, is bad on demurrer.—*Miller et al.* v. *Shackelford*, 95

PLEADINGS AT LAW—CONTINUED.

9. A *scire facias* to revive a judgment must set forth the ground on which the revival is sought, and if it omits to do so, it is fatally defective. *Ib.*

10. A plea, which professes to answer the whole, but which, in fact, answers only a part of the cause of action, leaving the remainder unanswered, is bad on demurrer.—*White* v. *Yarbrough*, 109

11. The verbal affirmance of a contract, made during minority, renders it valid from its date, and, whether under seal or not, the contract may be declared on without noticing the subsequent promise. The subsequent promise is in legal effect but a waiver of the defence of infancy, and a ratification of the original contract.—*West* v. *Penny*, 186

12. Every writing, which is the foundation of an action, being made by the statute of 1811 (Clay's Dig. 340, § 152) "evidence of the debt or duty for which it was given," it is not necessary, in declaring on a promissory note, to allege the consideration. The fact that the note appears on its face to have been given for the debt of another cannot affect the principle.—*Thompson* v. *Hall*, 204

13. A count in a declaration against a bankrupt on a pre-existing liability as the endorser of a promissory note, upon which he had been charged by regular proceedings against the makers, which, after stating that the makers on bill filed, &c. obtained an order enjoining the parties—that on the final hearing said injunction was by decree of the Chancellor made perpetual—and that from this decree an appeal was taken to the Supreme Court, *avers*, "that after the discharge of said defendant in bankruptcy, and whilst the said appeal was pending in the Supreme Court, the said defendant undertook and faithfully promised the plaintiff, that if plaintiff should lose said case in the Supreme Court, he would make it good to him, and plaintiff should lose nothing by said endorsement of the note—and that the said decree of the Chancellor was subsequently by said Supreme Court in all things affirmed," sets out a sufficient consideration to support a subsequent promise.—*Herndon* v. *Givens*, 261

14. Where in an action on a promissory note by the endorsee against the maker, the defence set up is a want of legal title in the plaintiff, a plea verified by affidavit is not necessary, but evidence appropriate to the issue may be introduced under the plea of *non assumpsit*—*Birch* v. *Tillotson*, 387

15. Where a count in a declaration by the endorsee against the personal representatives of the endorser of a negotiable note, avers, that by an agreement between the maker and endorser the surplus value of certain slaves, held by the latter as an indemnity, was, after the payment of the sum of $4646 13, to be applied to the discharge of several notes, of which the note sued on was one, and in the event the endorser

PLEADINGS AT LAW—CONTINUED.

should keep the slaves, &c. the surplus should be ascertained by three disinterested persons, &c , and further avers that said surplus was sufficient fully to indemnify the endorser, &c:—*Held*, that the count is not defective, because it fails to aver that the surplus had been ascertained in the mode designated by the agreement.—*Cockrill's Adm'r* v. *Hobson, use, &c.* 391

16. Where in an action on a sheriff's bond the breach assigned is that he failed to pay over to the plaintiffs the proceeds of goods sold under process, a plea avering "that while the said money was in the custody of the law, one Claude Beraujohn, by motion made, &c.. in pursuance of notice by him previously given, &c., obtained the direction of the court to pay over to said Beraujohn the sum of $105, which remained due him for the rent of the premises, whereon said goods were when seized, which said amount was paid to said Beraujohn, and the remainder to the plaintiff's attorney before action brought," is not bad for duplicity.—*The Governor, use &c.* v. *Bancroft et al.* 605

17. Where a plea is pleaded in short *by consent* and the plaintiff demurs, he cannot object that the plea does not inform him with precision of the evidence by which the defendant intends to make out his defence. *Ib.*

18. Where a *scire facias* to revive a judgment recites that B. W. in his life time, "under the style and description of B. W., administrator of all and singular the goods and chattels, rights and credits of E. J. C., deceased," recovered a judgment, &c., it cannot be intended that the judgment was recovered by him as administrator, but the words "style," &c. must be regarded as descriptive merely.—*Warren, ex'r*, v. *Rist, adm'r*, 686

19. Non-assumpsit *infra sex annos* is a good plea in *indebitatus assumpsit*.—*Ware & Cowles* v. *Dudley*, 742

20. A pleading is to be taken most strongly against the party whose pleading it is; and where the plaintiff, in his replication to a plea of the defendant, avers that the promise alleged was to pay out of the proceeds of a note, "when said note was collected," the averment must be understood to mean when the *whole* amount was collected. *Ib.*

21. The pleader need only state so much of a contract as shows the plaintiff's right to recover: He may state it according to its legal effect, and is not bound to state that which is merely matter of evidence.—*Adams* v. *Davis*, 748

PRACTICE AT LAW.

1. If a motion is made for a new trial, during the Term at which a case is tried, the Court may continue, and dispose of it at a succeeding Term.—*Walker* v. *Hale et al.* 26

PRACTICE AT LAW—CONTINUED.

2. If a party moves for a new trial, but without awaiting the action of the Court, prosecutes a writ of error to this Court, where the judgment is affirmed, the primary Court has no longer the power to grant his motion. *Ib.*

3. If a party offers in evidence an *entire* record, a part of which is legal, and a part illegal testimony, the court commits no error in excluding the whole.—*Kenan* v. *Holloway*, 54

4. In an action of trespass to try titles, instituted against a mortgagor in possession, the mortgagee, if entitled to the right of entry, may be admitted as a party defendant.—*Noble et al.* v. *Coleman & Gunter*, 77

5. It is not necessary, that a party should introduce a subscribing witness to an instrument, who is incompetent to testify, and give the opposite party an opportunity of waiving all objection to his competency, before he is allowed to prove its execution by other testimony.—*Ex'rs of Robertson* v. *Allen*, 106

6. An entry of record, in a suit commenced in the name of T. S., that it was represented to the court that G. D. M. was the administrator of T. S., with a prayer that G. D. M. be made a party plaintiff, is sufficient to authorise the appellate court to infer the death of T. S., and that the action of the court was based on sufficient evidence of that fact.—*Godbold et al.* v. *Meggison, adm'r*, 140

7. Where service of the writ has been accepted, and omitted to be proved, it may be proved and entered at a subsequent term; and where the record disclosed an order "that proof of the acceptance of the writ be now entered as of the last term," this court will intend that the proof was made. *Ib.*

8. Upon notice to the plaintiff, under the *eighth rule* for the regulation of "practice in the Circuit and County Courts," to produce the writing sued on, the sufficiency of the excuse for its non-production is addressed to the discretion of the primary court, and its decision is conclusive.—*Herndon* v. *Givens*, 261

9. It being made to appear to the Judge of the County Court, that his son is beneficially interested in a cause pending before him, he makes an order for its transfer to the Circuit Court, where the parties afterwards join issue and proceed to trial: *Held*—1. That the act of 1831 is a sufficient warrant for the transfer. 2. That the joinder in issue and going to trial in the Circuit Court is a waiver of objection. 3. Can the objection be made upon writ of error, or should not the party objecting have prayed a mandamus to rescind the order? QUERE.—*Marston* v. *Carr*, 325

10. The judgments and proceedings of a court are considered *in fieri* until the close of the term at which they are entered. The continuance of a cause may therefore be set aside during the same term, and the

PRACTICE AT LAW—CONTINUED.

parties required to go to trial, if the court is satisfied that no injustice will thereby be done to either of them.—*Saunders* v. *Coffin*, 421

11. The courts of this state cannot order a non-suit, or compel a plaintiff to take one, without his consent. *Ib.*

12. The fact that the execution, under which a sale is made, has not been returned to the court whence it issued, interposes no objection to its entertaining a motion to set aside the sale.—*Lee* v. *Davis et al.* 516

13. The admission in evidence of a second deposition of the same witness, taken without a previous order, is a matter entirely within the discretion of the primary court, and is not revisable on error.—*Herbert* v. *Hanrick*, 581

14. In criminal, as well as in civil cases, it is within the discretion of the court, on the application of either party, to require the witnesses to be examined out of the hearing of each other, and its ruling in that respect cannot be assigned as error.—*McLean* v. *The State*, 672

15. A guardian *ad litem* for infant distributees should be appointed a sufficient length of time before the day of final settlement to enable him to examine the accounts filed by the administrator; and the record should not only show the appointment, but his acceptance of the trust—otherwise the judgment will be reversed.—*Jenkins' Distributees* v. *Jenkin's Admr's*, 693

See *Discovery, &c.* 1.

PRINCIPAL AND AGENT.

1. A written power to an agent, in charge of the plantation of his principal, "to act for him in all cases whatever, and to do all which he might himself do," coupled with subsequent verbal instructions, when about to break up the plantation and remove his family to another State, "to settle up or discharge all demands against the family before he (the agent) left, and, acting under the power of attorney, to do all that might be necessary," will not confer on the agent the authority to sell the slaves of his principal.—*Dearing* v. *Lightfoot*, 28

2. If an agent, transcending his authority, sells the slaves of his principal, and the principal ratifies the act, the purchaser is entitled to hold the slaves as against a prior unregistered mortgage, of which he had no notice at the time of such ratification. *Ib.*

3. W., a resident of North Carolina, executed to C., of the same State, a power of attorney to receive a slave from S., who resided in Alabama, and to sell him: C. passing through Alabama on his way to Mississippi, received the slave from S. and endeavored to sell him, but failed to do so: He then endeavored to hire him, but in this also was un-

PRINCIPAL AND AGENT—CONTINUED.

successful, and, not being authorised to incur the expense of taking the slave along with him in the stage—the mode of conveyance by which he was travelling—he thereupon left him with S., free of hire, until W. could be informed of the circumstances and make some other disposition of the slave: *Held*—That in this unforeseen emergency, the agent acted in the line of his duty, and that S. is not liable for the hire of the slave.—*Williams* v. *Shackelford*, 318

4. The declarations of an agent, acting within the scope of his authority, and of the party with whom he contracts, when made at the time of a transaction, are a part of the *res gestæ*, and admissible in evidence. *Ib.*

5. If a third person contracts with a journeyman for the performance of work, without the name of his employer being disclosed, and, supposing him to be the party entitled to receive it, pays him therefor, he is discharged from all liability to the employer.—*Copeland* v. *Touchstone* 333

6. A simple power from a principal to his attorney, authorising him to confess judgment in favor of a third person, which is unsupported by a consideration and is not given as a security for a debt, or to render a security effectual, until executed, is revocable at the pleasure of the principal.—*Evans* v. *Fearne, Crenshaw & Co.* 689

7. If a collector, before demand or notice, pays over to the treasurer taxes, received by him under color, but without authority of law, such payment will discharge him from all liability to the party by whom they were paid.—*Crutchfield* v. *Wood*, 702

8. When an attorney, employed to collect money, is called on for a settlement, his admission of the amount collected is competent evidence against his client, but the client may nevertheless show by other proof that the fact admitted did not in truth exist.—*McRae et al.* v. *Ins. Bank of Columbus*, 755

PRINCIPAL AND SURETY.

1. Can a surety, when sued at law by his co-surety for contribution, impeach the validity of a purchase by the latter of trust property, conveyed by the principal for his indemnity, to reduce the recovery, or must he not in such case resort to a Court of Equity for relief?—Qu. —*John, adm'r*, v. *Jones*, 454

2. Where property is conveyed by the principal for the indemnity of a surety, his co-surety is liable for contribution, as to any balance that may remain due, after a faithful application of the proceeds of the trust estate towards the extinguishment of the debts. *Ib.*

3. One surety, having funds of the principal in his hands, for the purpose of paying the joint liability, cannot, as against his co-surety, be

PRINCIPAL AND SURETY—CONTINUED.

allowed reimbursement, out of the trust estate, for costs, commissions and damages, that subsequently accrue, without the latter's consent. *Ib.*

4. A surety, against whom a judgment is rendered, does not lose his right to have contribution from his co-surety, by sueing out a writ of error and superseding the judgment. *Ib.*

5. A. J., for the indemnity of P. J., a surety, executes to W. a deed of trust on two parcels of land, &c., which provides, that should the said P. J., in consequence of his liability, at any time thereafter, "suffer loss or damage, or be compelled to pay the said debts, or any part thereof, the said W., when requested by the said P. J , shall proceed to sell the property, or so much thereof as may be deemed sufficient, and from the proceeds of the sale reimburse and satisfy the said P. J. for all loss or damage which he may have sustained:" P. J. is compelled to pay a sum of money for A. J. greatly less than the conjoint value of the two parcels of land, and, at his request, W. advertises the lands for sale, but A. J. objects to one parcel of the land being sold separately from the other, as contemplated by the deed, for the reason that they will not thus sold command their full value: The parties thereupon enter into an agreement, by which A. J. consents to a sale of the two parcels of land *together*, and an appropriation of the proceeds, not only to the reimbursement of P. J., but towards the extinguishment of the other liabilities provided for in the deed, and in consideration thereof, P. J. covenants to "release the said A. J. from all claims or demands whereon he, the said P. J., is bound as security for the said A. J.—*Held*—

1st. That the agreement as to P. J. is supported by a sufficient consideration.

2. That the effect of P. J.'s covenant to release A. J. is to discharge W. H. J., a co-surety, from all liability for contribution. *Ib.*

6. The omission of the holder of a promissory note to present it to the personal representative of the deceased principal, within eighteen months after grant of letters of administration, will not release one co-surety from contribution to another, who has subsequently paid the debt.—*Evans, adm'r*, v. *Evans*, 465

See *Witness*, 2.

RECITALS IN DEED.

1. Where a subsequent purchaser insists that, as against a prior grantee whose deed has not been recorded, he is a *bona fide* purchaser without notice, it is incumbent on him to prove the payment of a valuable consideration: The recitals in his deed are not evidence thereof.—*Nolen & Thompson* v. *The Heirs of Gwyn*, 725

RECORD, EXEMPLIFICATION OF.

1. Where a record is composed of several distinct papers, they should be attached, that the court may be enabled to see that the clerk's certificate applies to all of them. But if this is not done, would it not be competent to establish the genuineness and authenticity of the transcript by showing that it is a sworn or examined copy?—QUERE?—*Herndon* v. *Givens*, 262

RIGHT OF PROPERTY, TRIAL OF.

1. A claimant, on a trial of the right of property, cannot show title in a stranger, for the purpose of defeating its condemnation.—*Foster* v. *Smith*, 192

2. In a proceeding under the statute to try the right of property, the general issue, after the onus is shifted, puts the claimant upon proof of his right to interpose his claim. *Ib.*

3. Where a note is made by J. H. S. and endorsed by R. S. and J. W. P. for the exclusive benefit of N. S., and J. W. P. at the time of the transaction agrees to be bound equally with the maker and first endorser, and N. S. afterwards, with the assent of the parties, executes a deed of trust to J. H. S. to secure them, and the property conveyed is levied on and claimed by the trustee under the deed, J. W. P., on the trial of the right of property, is an incompetent witness for the claimant, nor is his competency restored by a subsequent release to the claimant and R. S. of all his interest in the security and a bond of indemnity from them to him against all further losses on account of N. S.—*Scales* v. *Desha, Sheppard & Co.* 308

4. In a trial of the right of property between one claiming under deed of trust for the benefit of certain creditors of the debtor and an attaching creditor, the debtor being dead and a decree of insolvency and distribution having been passed on his estate, his distributees are *prima facie* competent witnesses for the claimant. *Ib.*

5. The sureties in a bond for the forthcoming of a slave seized by virtue of an attachment, and which slave is afterwards levied upon under an execution issued on the judgment rendered in the same suit, and claimed by a third person, are competent witnesses for the plaintiff in the trial of the right of property.—*Greene* v. *Tims, use &c.* 541

6. The promise of a plaintiff in attachment to waive his lien on the property attached in favor of certain persons cannot, on the trial of the right to the property, be taken advantage of by one who has no connection with the parties to the arrangement, and whose interest cannot have been prejudiced thereby. *Ib.*

7. The sheriff levied an attachment on a slave, and, taking merely a delivery bond for its forthcoming to answer and satisfy the judgment, restored the slave to the possession of the defendant, and made return on

RIGHT OF PROPERTY, TRIAL OF—CONTINUED.

the writ, that a claim had been interposed and bond executed for the trial of the right of property: The plaintiff in attachment thereupon proceeded to prosecute the claim suit, which, before its final disposition, was continued six times by general order of the court and five times by consent of the parties: During its pendency, the plaintiff aided the claimant in procuring security on a claim bond, given by him for other slaves levied upon under an execution in favor of another creditor of the defendant in attachment, and induced certain persons to become his sureties by promising to release his lien on the slave attached:—*Held*—

1st. That, however strongly the facts may tend to show an intent to hinder or delay other execution creditors of the defendant in attachment, it cannot be assumed as a conclusion of law that the lien of the attachment was lost.

2d. That if such conclusion could be indulged, an after claimant of the slave, who neither shows himself to have been an execution creditor, nor to have derived title under one, cannot be benefitted thereby. *Ib.*

SALES CONDITIONAL.

1. If the parties to an instrument, at the time of its execution, intend it as a security, whatever may be its form, equity will consider it a mortgage; and no terms or words used in it will be allowed to change its character and cut off the right of redemption.—*Robinson* v. *Farrelly*, 472

2. Where the vendee retains *the right to demand re-payment* of the vendor, notwithstanding the purchase, and although the property should be lost, it is conclusive to show that the transaction was intended as a security and not a conditional sale. *Ib.*

3. Courts of Equity incline against conditional sales, and where it is doubtful from all the circumstances attendant on a transaction, whether a conditional sale or a mortgage was intended, Equity will treat it as a security merely.—*Turnipseed* v. *Cunningham*, 501

4. Where it is doubtful whether a transaction was intended as a conditional sale or a mortgage, it is the duty of the purchaser, who insists upon the former, to show clearly that such was the intention of the parties at the time of the transaction. *Ib.*

See *Mortgage*, 2, 5.

SALES UNDER JUDICIAL PROCESS.

1. Whether a sheriff, who has levied on and advertised property under one execution, can sell under another, which has not been levied—QUERE?—*Bliss* v. *Watkins*, 229

SALES UNDER JUDICIAL PROCESS—CONTINUED.

2. The omission of the sheriff and attorney of the plaintiff in execution, the latter of whom becomes the purchaser, to undeceive one who at the sale asserts a superior title to the property sold, and who has had no notice of, but is evidently ignorant that the judgment and execution under which the sale is about to be made create a lien prior in point of time to his title, coupled with gross inadequacy of price, is a sufficient ground for setting aside the sale.—*Lee* v. *Davis et al.* 516
3. Where the injury complained of is in *the execution* of the process and not for defect in the process itself, it is competent for any person whose interests are thereby prejudiced to move to set aside the sale. *Ib.*
4. The interest of a vendee of land, who holds a bond for titles and has paid the purchase money, cannot be sold under execution at law, and such sale confers no title upon the purchaser.—*Hogan et als.* v. *Smith et als.* 600
5. A sale under execution is not void, merely because the officer sells a less interest in the property than the defendant really owns.—*O'Conner* v. *Youngblood,* 718

SCIRE FACIAS.

1. In a proceeding by *scire facias* to revive a judgment, a plea that seeks to reach behind the judgment, or to set up a defence against the original cause of action, is bad on demurrer.—*Miller et al* v. *Shackelford,* 95
2. A *scire facias* to revive a judgment must set forth the ground on which the revival is sought, and if it omits to do so, it is fatally defective. *Ib.*

SET OFF AND RECOUPEMENT.

1. If an overseer, employed at a stipulated price per annum, is sick a part of the time, and thus unfitted for active service, the employer may recoupe the damages sustained by the imperfect performance of the contract.—*Jones, adm'r,* v. *Dyer & Wife,* 221
2. In a suit at law on a note given for the purchase money of slaves sold and delivered to the defendant, damages in respect to them, resulting from the tortious act of the vendor's wife committed in his absence, cannot be allowed as a discount or set off, it not appearing that the husband consented to the tort, or gave it his subsequent sanction.—*Vaught* v. *Wellborn,* 377
3. L., as sheriff, seized the property of G., and, refusing to surrender it on demand, sold it under executions against H., and, by direction of H., paid over the surplus, left from the sale after satisfying the execu-

SET OFF, &c.—CONTINUED.

tions, to G. as his agent. *Held*—That in an action of trover by G. against the executor of L., the surplus, thus paid over, cannot be allowed to go in reduction of damages.—*Locke* v. *Garrett*, 698

SHERIFF AND SURETIES.

1. It is a good defence to a rule against the sheriff, for not returning an execution to the court from which it issued within the time prescribed by law, that it was delivered to the plaintiff, and that he undertook to return it.—*Vastbinder* v. *Spinks*, 385

2. Where the return of a sheriff upon a writ of attachment fixes on him a liability to the plaintiff, it is not competent for him in a suit by the latter founded on such return to prove that it is incorrect. In such case a direct application for leave to amend the return should be made to the court whence the process issued.—*The Governor, use, &c.* v. *Bancroft*, 605

3. If a sheriff seize two slaves under execution and deliver them to his overseer, who, without securing or confining them, attempts to carry them to the county jail for safe keeping, and in doing so, one of them escape, the sheriff is liable to the plaintiff to the extent of its value.—*Eldridge* v. *Spence et als.* 682

4. Where a sheriff, by suffering a slave seized under execution to escape, has incurred a liability to the plaintiff, a subsequent levy of the execution on other property, which fails to yield enough for its satisfaction, will not exempt him from the liability. *Ib.*

See *Witness*, 7.

SLANDER.

1. Although in an action of slander for charging the plaintiff with perjury, it is necessary for the defendant, if he pleads justification, to support his plea with such proof as would be required to convict the plaintiff on an indictment for that offence, yet it is not necessary, as in a criminal prosecution, that it should be of that degree of certainty requisite to remove all reasonable doubt from the minds of the jury.—A mere preponderance is sufficient.—*Spruil* v. *Cooper*, 791

See *Variance*, 3.

SUMMARY PROCEEDINGS.

1. The lien of a lessor on the goods and chattels upon the premises, for the rent due at the time of their seizure under attachment or execution, may be enforced by motion to the court to which the process is returnable, to direct an application of so much of the proceeds of the sale as may be necessary to discharge it.—*The Governor, use &c.* v. *Bancroft et al.* 605

SUPERSEDEAS.

1. A proceeding by *supersedeas* to arrest and have entry of satisfaction of an execution, is a suit between the parties to the judgment, and the pleadings must be made up in their names. A stranger to the record, though he be the assignee of the judgment, cannot be permitted to intervene and tender an issue in his own name.—*Edwards* v. *Lewis*, 813

2. Where in a proceeding to have entry of satisfaction of an execution, the only issue joined is the fact of payment, proof that the judgment was assigned to a third person before the payment, does not tend to establish or disprove the issue, and is consequently inadmissible. *Ib.*

TAX COLLECTOR.

1. If a collector, before demand or notice, pays over to the treasurer taxes, received by him under color, but without authority of law, such payment will discharge him from all liability to the party by whom they were paid.—*Crutchfield* v. *Wood*, 702

TENANTS IN COMMON.

1. One tenant in common is liable to account to the other, for the rents and profits of the joint estate, received by him with the other's assent. —*Pope et al.* v. *Harkins et al.* 321

2. If tenants in common agree that one of them shall occupy the joint estate, and pay to the other a stipulated rent for one half of the land he cultivates, a court of law is competent to afford full redress for a breach of the contract.—*Lockard* v. *Lockard*, 423

TRESPASS, ACTION OF.

1. In an action for a tort to to the person, the plaintiff is not entitled to a discovery from the defendant in aid of his action.—*Robinson* v. *Craig*, 50

2. A count, which avers "that the defendant falsely, maliciously, and without probable cause, charged the said plaintiff with the crime of felony, and upon said charge, falsely, maliciously, and without probable cause, caused the said plaintiff to be arrested by his body, and to be imprisoned and kept and detained in prison for a long time, to-wit, for the space of one day then next following, at the expiration of which said time, he the said defendant caused the said plaintiff to be released and set at liberty, and wholly abandoned his said prosecution," is not a good count in case for malicious prosecution, but is a good count in trespass for false imprisonment.—*Ragsdale* v. *Bowles*, 62

3. If counts in case and trespass be joined, and the defendant demurs to one count only, the demurrer must be overruled. The mis-joinder can be reached alone by demurrer to the declaration. *Ib.*

TRESPASS, ACTION OF—CONTINUED.

4. In this State, an action of trespass *quare clausum fregit* to recover mesne profits will not lie in favor of a disseissee, unless he has *regained the possession*, and that too *by entry*.—*Fry* v. *The Branch Bank at Mobile*, 282

5. B., the owner of a slave, gave permission to W. to whip him whenever he should find him on his premises, and to use such means as were necessary and proper to keep him away. W. caught the slave on his premises, and whipped him, and, having found him there again, about three years afterwards, inflicted on him a whipping of much greater severity: *Held*—1st. That in an action of trespass for the second, evidence of the first whipping is admissible in mitigation of damages. 2d. That if the plaintiff desired to restrict its influence upon the jury, he should have asked appropriate charges of the court limiting its legal effect.—*Boling* v. *Wright et al.* 664

TROVER.

1. The exception to the general rule, by which the declarations of the defendant in trover in reply to a demand of the property, when they amount to a reasonable excuse or qualification of his refusal to deliver it, are allowed to go to the jury, does not apply where the possession has been tortiously acquired.—*Parker* v. *Goldsmith*, 526

2. Where the trustee by a deed of assignment is given the discretionary power to sell whenever he thinks proper, either at private or public sale, a provision that the assignor shall retain possession of the chattels conveyed, until a favorable opportunity for the sale of them shall offer, does not impair the right of the trustee to reduce them to his immediate possession, or to maintain trover against one who converts them.—*Abercrombie* v. *Bradford*, 560

3. The wrongful seizure under an attachment of goods in the hands of a bailee, and taking from him a forthcoming bond for their delivery, is such a conversion as will support an action of trover by the owner against the sheriff. *Ib.*

4. Trover lies against an executor for a conversion by the testator in his life-time.—*Locke* v. *Garrett*, 698

5. L., as sheriff, seized the property of G., and, refusing to surrender it on demand, sold it under executions against H., and, by direction of H., paid over the surplus, left from the sale after satisfying the executions, to G. as his agent: *Held*—That in an action of trover by G. against the executor of L., the surplus, thus paid over, cannot be allowed to go in reduction of damages. *Ib.*

See *Evidence*, 14.

TRUSTEE AND CESTUI QUE TRUST.

1. If the trustee, in a deed for the benefit of creditors, improperly permits the grantor in his life-time or his administrator after his death to retain possession of the slaves of the trust estate and receive the proceeds of their labor, without deriving any profit to himself therefrom, the measure of his liability is not the benefit that may have accrued to the grantor or his estate, but the value of the reasonable hire of the slaves.—*Harrison, adm'r, et al.* v. *Mock et al.* 616
2. Where a trustee, himself a creditor, accepts from the debtor a deed of trust for the benefit of all his creditors, which provides for their payment "equally and rateably, without any distinction or preference," he thereby agrees to execute the trust according to the provisions of the deed and to share *pro rata* with the other creditors, should the trust effects prove insufficient for the satisfaction of all. *Ib.*
3. Where all the effects of a trust estate have been converted into money, and the debt constituting a charge upon it ascertained, the decree against the trustee, who is himself a creditor, should be for the balance that remains, after deducting the dividend to which he is entitled, and not for the entire sum found in his hands.—*Ib.* 617
4. A trustee, who, after the acceptance of the trust, in good faith, pays off executions which create a lien on the trust estate, is entitled to be reimbursed the full amount of such payments, but he cannot be allowed to avail himself of executions thus purchased to sell the trust effects. *Ib.*

See *Chancery—Pleading and Practice in*, 19.

TRUSTEES, SALES BY.

1. The regularity and validity of a trustee's sale, and of the purchase under it, cannot be questioned by a stranger to the deed.—*Herbert* v. *Hanrick*, 581

USE AND OCCUPATION.

1. Assumpsit for use and occupation will lie against one who takes possession of vacant land, admitting that he has no title, and expressing a willingness to pay rent to the rightful owner; but possession by a naked trespasser is not of itself sufficient to sustain the action. (Davidson v. Ernest, 7 Ala. 817, commented on and approved.)—*Ex'rs of Smith* v. *Houston, use &c.* 111
2. A plaintiff in assumpsit for use and occupation cannot recover rent, that has accrued before the execution and delivery of the deed under which he claims title. *Ib.*
3. Assumpsit for use and occupation will lie against a naked trespasser on real estate, in favor of a lessee who elects to waive the trespass and permits the trespasser to retain possession until the expiration of his term.—*Catterlin* v. *Spinks*, 467

USURY.

1. Where the acceptor of a bill of exchange, drawn for his accommodation, disposes of it at a rate of discount greater than the legal rate of interest, the contract is usurious, and being thus infected, the purchaser cannot be regarded as as a *bona fide* holder.—*Carlisle* v. *Hill*, 398

VARIANCE.

1. Where the verdict in a claim suit finds the issue generally in favor of the plaintiff, a judgment condemning the *interest* of one defendant in execution only is variant from the verdict and erroneous, but the error is one which does not require the cause to be remanded, and will consequently be here corrected at the cost of the plaintiff in error. —*Windham* v. *Clarke et al.* 659

2. On the trial of a criminal prosecution against a clerk of the Circuit Court for collecting, under judgment in favor of the State, and refusing to pay over to the county treasurer money to which he is entitled, within three days after demand, proof that the collection was made in *county claims* will not support the indictment.—*Tucker* v. *The State*, 670

3. Where the declaration in an action of slander alleges, that the words spoken were in reference to an oath taken by the plaintiff before the register and receiver of a land office, touching the entry of land, proof of an oath taken before a notary public, concerning the same subject matter, does not support the allegation.—*Phillips* vs. *Beene*, 720

VENDOR AND VENDEE.

1. A vendee of land, who has re-sold it with covenant of warranty, and delivered up the possession, if the deed from the original vendor is lost, may apply to a Court of Chancery to compel the widow and heirs of the vendor to supply the loss, by a re-conveyance, without waiting until the heirs assert title to the land.—*Owen et al.* v. *Paul*, 130

2. A vendor of land, who has executed his bond, conditioned to make title upon the payment of the purchase money, has a lien on the land until such payment is made, and the vendee must show that he has an equitable right to the land, freed from such lien, before the Orphans Court can decree that the legal title be conveyed to him by the personal representative of the vendor. Such a lien is regarded in the nature of a mortgage, and the fact that the notes given for the purchase money are barred by the statute of limitations does not destroy it.—*Driver, adm'r*, v. *Hudspeth*, 348

3. An inchoate right to dower is such an incumbrance on land as will authorise a purchaser, who has contracted for a good and lawful title, to refuse to perform the contract.—*Parks* v. *Brooks*, 529

VENDOR AND VENDEE—CONTINUED.

4. Where the vendee retains possession of the land, a Court of Equity will not rescind the contract, unless there be some special ground for its interposition, such as the vendor's inability to make title, coupled with his insolvency, or fraud in the sale. *Ib.*

5. A Court of Equity will not rescind a contract, where the vendor, although unable to make title, is perfectly solvent, and has been guilty of no fraud, on the ground that he is a resident of another State, when it is shown that he was such at the time of the contract, and has so continued ever since. *Ib.*

6. Upon the approval by the President of a contract, made by an Indian reservee under the Creek Treaty of 1832, for the sale of his land, the title of the purchaser relates back to the date of the contract, and inures to his intermediate vendee, whether by quitclaim or warranty deed.—*Nolen & Thompson* v. *The Heirs of Gwyn*, 725

7. In an action on the case by the vendee against the vendor of land, to recover damages for falsely representing that the tract embraced a certain designated portion of good land, whereby the vendee was induced to make the purchase, it is not necessary to prove that the vendor knew that the representation was false at the time he made it.—*Munroe* v. *Pritchett*, 785

VERDICT.

1. A verdict in an action of trespass to try title, which describes the premises as "lot number twenty-eight in the plat of the town of Pickensville in Pickens county," is sufficiently certain to support a judgment. —*Henley* v. *Br. Bank at Mobile*, 553

2. The crime of murder being divided by our penal code into two grades, with different punishments, it is necessary on the trial of an indictment for that offence, that the verdict of the jury should ascertain the degree, otherwise no judgment can be pronounced upon it.—*Cobia* v. *The State*, 781

WARRANTY.

1. An instrument in the following words: "Received, Mobile, 24th April 1845, of James Barnes, six hundred and fifty dollars for a negro slave, named Joe, about twenty-five years old, sound and healthy, the title to the same I fully guarantee," does not import a warranty of soundness. —*Barnes* v. *Blair*, 71

2. Where there is an express warranty in one particular, the law will not imply it in another. *Ib.*

3. A warranty of soundness is broken, if the property is diseased at the time of the sale, whether the disease be of a permanent character or not, and

WARRANTY—CONTINUED.

the vendee is entitled to recover to the extent of the damage he has sustained by the breach.—*Marshall* v. *Wood*, 806

4. The vendee, after a breach of warranty, may retain the property in its unsound condition, and rely upon the warranty. He is not bound to accept the proposition of the vendor to rescind the contract and refund the purchase money, with interest, &c.; nor can his promise to consider such proposition, and to give him notice whether he will accept it or not, before he institutes suit, which he fails to do, deprive him of his action, or amount to a waiver or discharge of the vendor's liability—especially where it is not shown that the latter is placed in any worse condition by the want of such notice. *Ib.*

5. In an action for a breach of warranty of soundness in the sale of a slave, the true measure of damages, where the vendee retains the property, and it is of any value, is the difference between its actual value at the time of the sale and the value it would have possessed had it conformed to the warranty—holding the price paid as evidence of the latter—to which the jury may add interest on such difference, and money necessarily paid to a physician in attempting to cure the disease. *Ib.*

WATER-COURSES.

1. One invested by grant from the government with title to land, through which a water course runs, acquires thereby no greater right to the use of the water than others, over whose premises the same stream passes, and cannot so use it as to corrupt or impair its quality to their prejudice or injury.—*Lewis* v. *Stein*, 214

WILLS, TESTAMENTS, AND PROBATE OF.

1. J. M. by his will bequeathes certain property to his son, C., in trust, &c. for the maintenance of his son, R., *his family, and lawful children, which he now has or may hereafter have, and the survivor of them: Held*—That the limitation over, in favor of the survivor, regarded as an executory devise, is too remote and is consequently void.—*Allen & Wife* v. *White, adm'r*, 181

2. Where J. M. bequeathes property to his son, C., in trust, &c. for the maintenance of his son, R., *his family, and lawful children, which he now has, or may hereafter have, and the survivor of them*, and on the further trust, that his said son, R., jointly with the trustee, shall have the power to *sell* any part of the property, and to *dispose of all or any part of it himself by last will and testament*, the limitation over in favor of *the survivor*, being repugnant to the absolute power of disposal given to R. by the will, is void. It is essential to the validity of an executory devise, that it cannot be defeated by any act of the first taker. *Ib.*

3. The Orphans' Court of the county in which a testator dies has juris-

WILLS, &c.—CONTINUED.

diction to take the probate of his will of real estate, and its decree in such case, however erroneous, cannot be collaterally impeached by a stranger to the proceeding.—*Herbert* v. *Hanrick*, 581

4. Where a testator directs his executors to keep together and manage the property until the death of his widow, to distribute the annual proceeds, after supplying her wants, among the legatees, and at her death to divide the property itself among them in such a way, taking into the account the advances made by himself and those that may be made by the executors, as shall render the portion of each equal, a purchaser of the interest of one of the legatees acquires only the rights of such legatee upon the final settlement, and cannot claim any other or greater interest.—*Goodman, ex'r*, v. *Benham, adm'r*, 625

WITNESS.

1. A legatee under a will is *prima facie* an incompetent witness for the executors in a suit against them, for money alleged to have been due by the testator.—*Exr's of Robertson* v. *Allen*, 106
2. Where a principal places in the hands of his surety the note of a third person as an indemnity against his liability, and the surety, after sueing the note to judgment, without the consent of the principal, settles said judgment by taking from the defendant therein the note of another person, endorsed by him, the principal is a competent witness for the surety in a suit against the said defendant as endorser of the note so assigned by him in discharge of said judgment.—*Herndon* v. *Givens*, 262
3. In the examination of a witness on *voir dire*, it is permissible for him to testify as to the contents of written instruments that are not produced· *Ib.*
4. Where a note is made by J. H. S. and endorsed by R: S. and J. W. P. for the exclusive benefit of N. S., and J. W. P. at the time of the transaction agrees to be bound equally with the maker and first endorser, and N. S. afterwards, with the assent of the parties, executes a deed of trust to J. H. S. to secure them, and the property conveyed is levied on and claimed by the trustee under the deed, J. W. P., on the trial of the right of property, is an incompetent witness for the claimant, nor is his competency restored by a subsequent release to the claimant and R. S. of all his interest in the security and a bond of indemnity from them to him against all further losses on account of N. S.—*Scales* v. *Desha, Sheppard & Co.* 308
5. In a trial of the right of property between one claiming under deed of trust for the benegt of certain creditors of the debtor and an attaching creditor, the debtor being dead and a decree of insolvency and distribution having been passed on his estate, his distributess are *prima facie* competent witnesses for the claimant.—*Ib.* 309

WITNESS—CONTINUED.

6. In a contest between the creditor and garnishee of a debtor, the debtor is *prima facie* an incompetent witness for the garnishee.—*Marston* v. *Carr*, 325
7. The Sheriff, on a trial of a rule against himself and securities for failing to return an execution, is incompetent to testify against the plaintiff.—*Vastbinder* v. *Spinks*, 385
8. The maker of a negotiable note is a competent witness for the endorsee in an action against the endorser for the purpose of proving that he has fully indemnified the latter.—*Cockrill's Adm'r* v. *Hobson, use*, &c. 391
9. Where money is received to the use of a firm, and suit is instituted for its recovery against one of the partners alone, the other, being liable to his copartner for contribution in the event of a recovery, is an incompetent witness for him.—*Cochran & Estill* v. *Cunningham's Ex'r*, 448
10. The sureties in a bond for the forthcoming of a slave seized by virtue of an attachment, and which slave is afterwards levied upon under an execution issued on the judgment rendered in the same suit, and claimed by a third person, are competent witnesses for the plaintiff in the trial of the right of property.—*Greene* v. *Tims, use*, &c. 541
11. A witness, who is not a medical man, is incompetent to express an opinion as to the particular species of fits with which any one is afflicted.—*McLean* v. *The State*, 673

See *Intendments, &c.* 3.

WRIT OF RIGHT.

See *Curtesy, &c.* 1.

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